

(25,361)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 531.

THE CITY OF MITCHELL, APPELLANT,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF SOUTH DAKOTA.

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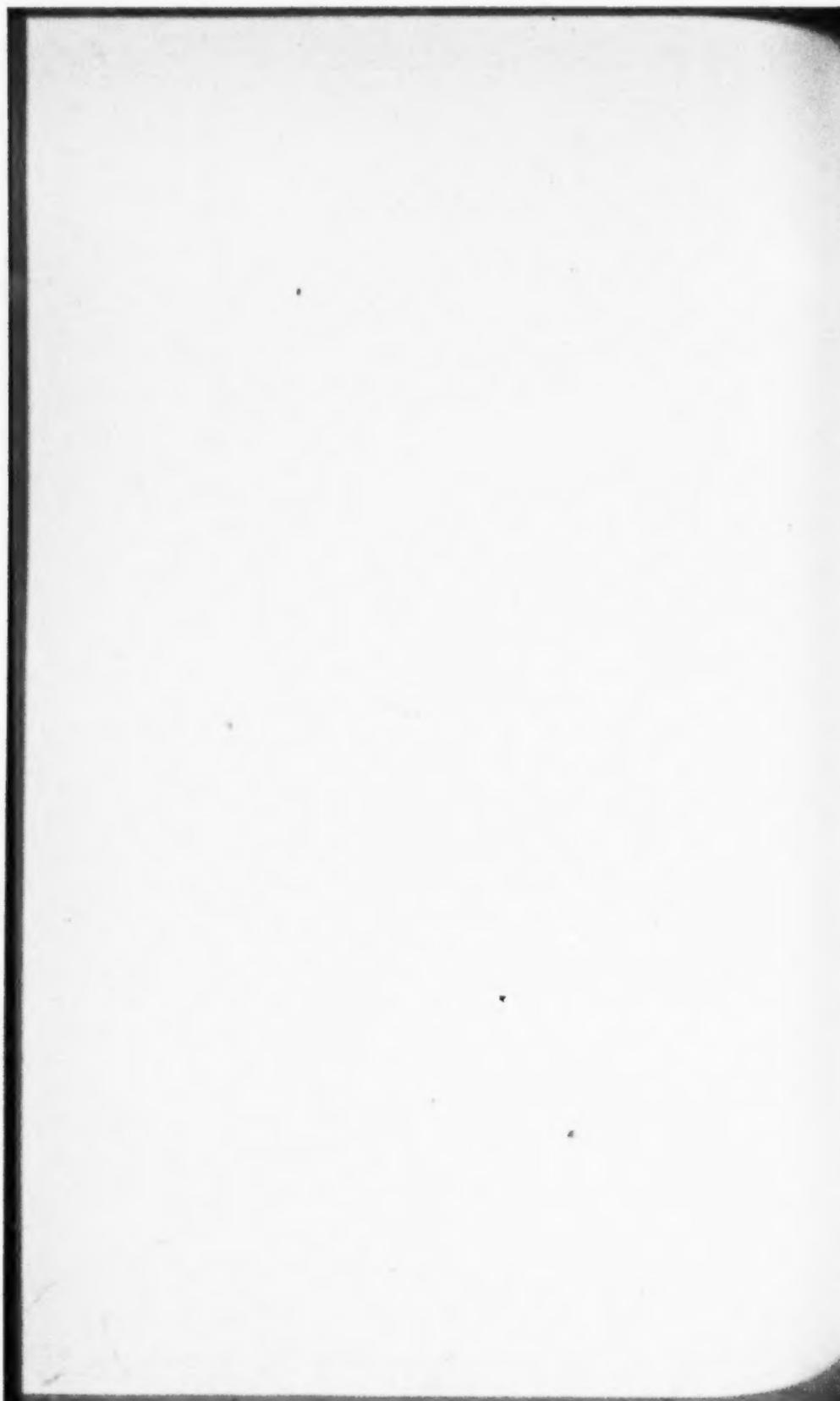
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1 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To the above named Complainant, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 9th day of October, A. D. 1916, pursuant to an order allowing an appeal, filed and entered in the Clerk's office of the District Court of the United States for the District of South Dakota, from a final decree signed, filed and entered on the 14th day of September, A. D. 1915, in that certain suit being in Equity Number 5, wherein you are Complainant and Appellee and the City of Mitchell, a municipal corporation, is defendant and Appellant, to show cause, if any there be, why the decree rendered against the said Appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Dated this 15th day of April, A. D. 1916.

WILBUR F. BOOTH,
*United States District Judge for the
District of South Dakota.*

2 [Endorsed:] #5 S. D. Equity. United States District Court, District of South Dakota, Southern Division. Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant. Due and personal service of the within Citation on Appeal upon me at Huron, South Dakota, is admitted this 15- day of April, A. D. 1916. Null & Ruydel, Attorney for Plaintiff. Gamble, Wagner & Danforth, Lautz Miller, Attorneys for Defendant, Sioux Falls, South Dakota. Filed April 15, 1916. Oliver S. Pendar, clerk, by C. C. Schwarz.

3 In the District Court of the United States of America, in and for the Southern Division of the District of South Dakota.

In Equity. No. 5, S. D.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Plaintiff,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Be it remembered, that on the 25th day of March, A. D. 1913, there was filed in the above entitled court, on behalf of plaintiff, Bill in Equity; which said Bill in Equity is in words and figures the following, to-wit:

United States District Court, District of South Dakota, Southern Division.

In Equity.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Bill of Complaint.

To the Judges of the District Court of the United States for the District of South Dakota:

The Dakota Central Telephone Company, a corporation, organized and existing under and by virtue of the laws of the State of South Dakota, with its principal place of business at Aberdeen, South Dakota, by leave of Court first obtained, brings 4 this, its bill of complaint, against the City of Mitchell, a municipal corporation, existing within, and by virtue of the laws of the State of South Dakota, and thereupon your orator complains and says:

I.

That your orator is now and at all times since the 30th day of August, 1904, has been a corporation organized under and by virtue of the laws of the State of South Dakota, empowered and chartered to purchase, lease, construct, and operate telephone lines and exchanges.

That within the meaning and purview of the laws of the State of South Dakota, your orator is known as a telephone company and common carrier, that by Section 554 of the Civil Code of the Compiled Laws (1903) of the State of South Dakota, which is as follows: "There is hereby granted to the owners of any telegraph or

telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys, and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys, or highways said line shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations." Your orator was granted the right of way for telephone purposes over the public grounds, streets, alleys, and highways in the State of South Dakota. That since the organization of your orator on last above mentioned date, your orator has acquired by purchase and construction, certain lines of of telephone and certain telephone exchanges, and has been engaged as a common carrier in the business of rendering telephone service and transmitting telephone messages and communications for the general public on equal terms without discrimination throughout and between the cities, towns, villages, and districts in and to which your orator has telephone lines and exchanges.

That at the present time your orator, as owner, is actively engaged in the operation of telephone exchanges in about eighty-five cities and towns, and has about two hundred and sixty-five telephone stations, other than exchanges, situated in the State of South Dakota, North Dakota, and Minnesota.

That all of said cities, towns, villages and telephone stations are connected by telephone lines owned and operated by your orator.

That said telephone system consists of about eighty-five telephone exchanges, about two hundred sixty-five stations and about five thousand miles of telephone line outside of the lines situated in cities and towns. That in the construction, purchase, and acquisition of said telephone lines, exchanges and stations, your orator has expended more than \$2,000,000.

II.

That the defendant, City of Mitchell, is and at all times, hereinafter mentioned, has been a municipal corporation situated in Davison County, South Dakota.

III.

That heretofore and on or about May 11th, 1898, the City Council of the City of Mitchell, adopted and passed, and the Mayor of said City approved an Ordinance in words and figures as follows:

Ordinance No. 135.

An ordinance granting to F. E. Elee, his Associates, Heirs, and Assigns the Use of the Streets, Alleys and Public Grounds of the city of Mitchell, South Dakota, for the Erection and Maintenance of a Public Telephone System.

Be it ordained by the city council of the city of Mitchell, South Dakota.

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said city, the said F. E. Elce, his associates, heirs and assigns are hereby granted the right to the use of the streets, alleys, and public grounds of the said city of Mitchell, South Dakota, for the erection and maintenance of a public telephone system for the term of fifteen years from the date of adoption or approval of this ordinance.

Section 2. That for such purposes the said F. E. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said city of Mitchell, and erect poles and stretch wires, and erect such other appliances as may be necessary

and proper for the establishment of such telephone system.

7 Provided, that such poles, wires, and appliances shall not

so placed as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines or poles, wires and other appliances, shall be located as far as possible in the alleys of said city. Provided further that in no case shall the poles, wires and other appliances be placed in the main street, except for the purpose of crossing said main street upon the streets running east and west. It is also provided that said city council shall have the right to direct the location of poles and lines or wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the city council of the said city of Mitchell.

Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval of this ordinance have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs, and assigns shall provide a suitable and convenient place for a central office and shall maintain such office in operation during the business hours of each week day during the year, and at such other times as business may demand; and the maximum rent for the said pay telephones established under this ordinance shall not exceed one dollar per month for business houses and one dollar and twenty cents per month for residence houses, for service within the

limits of the city of Mitchell; provided, that if the said F.

8 Elce, his associates, heirs, and assigns shall fail or neglect to have at least twenty telephones in successful operation within the expiration of six months from the adoption and approval of this ordinance then this ordinance shall be null and void and all rights and privileges granted thereunder revoked.

Section 4. That in consideration of the said city of Mitchell granting to the said F. B. Elce, his associates, heirs and assigns the right and privilege to use the streets, alleys and public grounds of the said city of Mitchell for the erection and maintenance of a public telephone system, the said F. B. Elce, his associates, heirs and assigns, shall erect and maintain three telephones at such places as the city council shall direct, and that the said three telephones shall be furnished to the said city during the term of fifteen years without cost or expense to the city of Mitchell; provided a

that at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of two thousand four hundred dollars (\$2,400.), the said F. B. Elce, his associates, heirs and assigns, shall pay to the city of Mitchell ten per cent of the amount in excess of Two Thousand Four Hundred dollars (\$2,400), received as gross receipts from the said telephone system, which
said sum shall be paid to the city at the end of each and
9 every year, and the city council shall have the right and
privilege to examine the books of the said telephone system
for the purpose of ascertaining the gross earnings of the said telephone system.

Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section 6. That if the said F. B. Elce, his associates, heirs and assigns, shall fail to comply with any of the provisions of this ordinance, then the city council of the city of Mitchell, shall have the power to declare the privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intention shall be given by the said city council to the said F. B. Elce, his associates, heirs, and assigns, and a reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and Approved May 11th, 1898.

THOMAS FULLERTON, *Mayor.*

Attest:

J. K. SMITH,
City Auditor.

That said ordinance was duly published, and the said F. B. Elce, the grantee in said ordinance No. 135, duly accepted the terms and conditions of said ordinance, and that under and in pursuance thereof the said grantee therein, F. B. Elce, installed a local telephone system in said city of Mitchell, South Dakota, and
10 used and occupied the streets, alleys, public grounds, and highways of said city with the poles, wires, and fixtures used in the operation of said telephone system; that the said F. B. Elce within six months after the passage, approval and publication of said ordinance No. 135 did have not less than twenty telephones installed and in successful operation in said city as provided by said ordinance, and that said F. B. Elce conducted and operated said local telephone system in said city of Mitchell, South Dakota, until on or about the 8th day of July, 1904.

IV.

That the Dakota Central Telephone Lines, a corporation organized and doing business under the laws of the State of South Dakota, about March 1904, applied to the City for its consent to the construction of a telephone system in the said City of Mitchell. That on or about the 21st day of March, 1904, the city council of the

City of Mitchell adopted and passed, and the Mayor of said city approved an ordinance in words and figures as follows:

Ordinance No. 174.

An ordinance to grant permission to the Dakota Central Telephone Lines, (Inc.) their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating long distance telephone lines, within and through the city of Mitchell, South Dakota.

11 Be it ordained by the council of the city of Mitchell, S. D.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Telephone Lines, (Inc.) their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main Street, Park Avenue, Fourth Street and Fifth Street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of the street commissioner, or a committee appointed by the city council.

Section 3. All poles, wires and fixtures are to be places so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways, or shade or ornamental trees, in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the city of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

12 Section 4. The rights and privileges herein granted are not exclusive, and the said city of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the city of Mitchell, S. D. shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect, from and after the date of its passage and approval.

Passed March 21st, 1904.

Approved.

J. L. HANNETT,
Act. Mayor.

J. G. MARKHAM,
Auditor.

That said ordinance was duly published according to law.

V.

That said ordinance No. 174 was found to be insufficient for its purposes and thereupon said Dakota Central Telephone Lines applied to the City Council of the City of Mitchell for a further ordinance. That pursuant to such application and on or about the 6th day of June, 1904, said city council adopted and passed, and on the 7th, 1904, the Mayor approved of an ordinance in words and figures as follows:

Ordinance No. 180.

An ordinance to grant permission to the Dakota Central Telephone lines, (inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota.

Be it ordained by the city council of the city of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Telephone lines, (Inc.), their successors or assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park avenue and Fourth and Fifth Streets, at right angles, where it is necessary, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the city of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said city of Mitchell, reserves the right to grant the same rights and privileges to other parties, the same, however, not interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the city of Mitchell, shall have the right to string wires on the poles of the Dakota Central

Telephone lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone lines.

Section 6. This ordinance shall be in effect, from and after the date of its passage and approval. Passed June 6th, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, *Mayor.*
J. G. MARKHAM, *Auditor.*

That said ordinance was duly published according to law.

VI.

That at the time of the adoption and approval of said ordinances No. 174 and No. 180, the telephone instruments then in general use in telephone exchanges, and in use in the Mitchell exchange were not instruments that could be used successfully for conversations over long distances, but that there had been developed certain 15 improved telephone instruments that could be used for such conversations over long distances. That such telephones were then known as "Long distance telephones," and were only supplied to subscribers at telephone exchanges by special arrangement with the individual subscribers who desired an instrument efficient for both local and long distance conversations.

That at said time, the art of telephony had advanced so that the public in general were demanding the installation of "Long distance telephones" in local telephone exchanges.

That long prior to the adoption of said ordinances, Nos. 174 and 180, the Southern Dakota Telephone Company had constructed certain telephone lines between, and into, the city of Mitchell, and certain other cities and towns in South Dakota. That said Southern Dakota Telephone Company had secured the consent of the city of Mitchell to the construction of such lines and such lines were then commonly known as "Toll lines" as distinguished from telephone exchanges. That during the year 1903, said Dakota Central Telephone Lines purchased the said Toll lines from said Southera Dakota Telephone Company, and were operating such Toll Lines into the City of Mitchell at the time of, and for a long period prior to, the adoption and approval of said ordinances Nos. 174 and 180.

VII.

That said Dakota Central Telephone Lines relying on the consent of the city of Mitchell, as expressed in said Ordinance No. 174 on or about May 25th, 1904, entered into a contract with said F. B. Elce, whereby said Dakota Central Telephone Lines purchased 16 from said F. B. Elce, "all the property now (then) known as the Mitchell Telephone Exchange, consisting of poles, wires, cables, insulators, and instruments, switchboard and appliances of every nature, now (then) used in the exchange known as the Mitchell Telephone Exchange," as well as certain real property

d in connection therewith. The possession to be transferred on
the 1st, 1904.

That after entering into said contract for the purchase of said
exchange, said Dakota Central Telephone Lines discovered the
insufficiency of said Ordinance No. 174 and thereupon applied to
the City Counsel for said Ordinance No. 180. That when said
Ordinance 180 was enacted and approved and on or about July 6th,
1904, said Dakota Central Telephone Lines completed the purchase
of said exchange, and took possession of the same. Thereafter said
exchange was owned and operated by said Dakota Central Telephone
Lines, until about October 2nd, 1904, when said exchange, together
with all other exchanges, lines, and telephone properties, rights and
franchises owned by said Dakota Central Telephone Lines were con-
veyed to the complainant, Dakota Central Telephone Company.

VIII.

That after the purchase of all the exchanges, lines, telephone
properties, rights and franchises of the Dakota Central Telephone
Lines by the complainant, the complainant entered into possession
of all said property and particularly the said exchange in the
city of Mitchell, and the Toll lines running into and out of
the said City of Mitchell. And thereafter the complainant
continuously operated said exchange and toll lines, and is now
operating the same.

IX.

That thereafter there was such improvement in the telephone
instruments and appliances, that it became desirable to re-construct
the telephone exchange in the city of Mitchell, in order to install
a telephone system known as the Automatic Telephone System.
That to properly install such Automatic System it was necessary
to put in permanent underground ways in which to place the wires
and cables, and otherwise construct and install expensive instru-
ments. That the complainant might be secure in making such
extensive improvements, it applied to the City Council of Mitchell
for its consent to the same, whereupon and on or about the 10th
day of April, 1907, the city council passed, and the Mayor approved
an Ordinance as follows:

"Be it resolved by the City Council of the City of Mitchell, South
Dakota, that the right is hereby granted to the Dakota Central Tele-
phone Company, their successors or assigns, to place, construct and
maintain through and under the streets and alleys, and public
grounds of said city, all conduits, manholes and cables proper and
necessary for supplying to the citizens of said city and the public
in general communication by telephone and other improved appli-
ances."

X.

That after the passage and approval of said ordinance on April
10th, 1907, the complainant relying on said ordinance as well as

the ordinances hereinbefore mentioned, began to reconstruct, and extend its said telephone exchange in the city of Mitchell. That said work was undertaken under a definite plan of placing all wires within the business district of said city under-ground, and with the plan of finally *unstalling* said Automatic Telephone System. That while such work and improvements were under way, the telephone exchange was kept in continuous operation which caused the work to proceed very slowly. That such work was carried on until the plant was thoroughly prepared for the installation of the said Automatic System, and finally during the latter part of the year 1912, a complete automatic telephone system was installed and put into operation and service.

That as a part of the improvements necessary to the installation of said Automatic System, the complainant erected a fire-proof exchange building.

That, in all, this complainant has expended more than \$110,000.00 in the erection of said exchange building, and in the installation of said Automatic Telephone System.

That said Automatic Telephone System is now in successful operation, and is the most efficient system known to the art of telephony, and said Automatic Telephones are efficient for use, both in local and in long distance conversations.

19 That there are about 1,100 subscribers to said Automatic Telephone System in said city of Mitchell, each and all of whom are in direct connection, and can communicate with persons at all the exchanges and stations on complainant's telephone system in South Dakota, North Dakota, and Minnesota.

XI.

That since the complainant purchased said telephone exchange and toll lines in said City of Mitchell, the said City of Mitchell has at all times designated the streets and alleys, and the places where poles, lines, and underground work should be placed.

That the complainant has at all times obeyed the commands, rules, and regulations of said city in the placing of its poles, lines, and conduits in the streets and alleys of said city and in the operation of said Telephone Exchange and toll lines in said city.

XII.

Your orator further shows to the court that by reason of the incorporation of your orator as a telephone company, and the grant of right of way in the streets and alleys and highways of the State of South Dakota, and by reason of the acceptance of the franchises, rights, and privileges conferred upon it by the State of South Dakota as a telephone company, and the construction, purchase and operation of said telephone lines and exchanges in the City of Mitchell as aforesaid, and the consent of said City of Mitchell to

20 the construction and establishment of said telephone exchange and telephone lines in the City of Mitchell, South Dakota, your orator has acquired a vested right to maintain and

perate its said telephone exchange and lines, and that to secure your orator in the peaceful enjoyment of such vested rights as against the wrongful acts of the defendant as hereinafter set out, your orator brings this suit.

XIII.

And now your orator further shows to the Court that it now owns and operates lines of telephone extending from the City of Chamberlain on the West through the City of Mitchell to the Cities of Marshall and Heron Lake in the State of Minnesota on the East, and from the Cities of Edgely, Lamour and Oakes, North Dakota on the North through the City of Mitchell to the City of Running Water in the State of South Dakota on the South.

That at certain of its Eastern terminals in the State of Minnesota your orator's lines of telephone connect with the lines of the Northwestern Telephone Company, so that patrons in South Dakota as far West as Chamberlain can, by use of the lines extending through the City of Mitchell, and do almost daily, communicate with persons at cities and towns situated in Minnesota by use of the lines extending through the City of Mitchell.

That your orator is continuously engaged in transmitting over its said lines of telephone and delivering messages from persons in the State of South Dakota to persons in the States of Minnesota, North Dakota, Iowa, and Nebraska, and is continuously engaged in transmitting over its said lines of telephone and delivering messages from persons in said States of Minnesota, North Dakota, Iowa and Nebraska to persons in South Dakota. That the tolls for such interstate communication amount to more than Four Thousand Dollars a month.

That since the establishment of said telephone exchange and telephone lines in the City of Mitchell, your orator entered into a contract with the United States Government whereby your orator daily received from the United States Weather Bureau at Huron, South Dakota, and transmits and delivers the messages of the officers of the United States forecasting the weather; such messages being delivered to thirty-two cities and towns situated on your orator's lines in South Dakota. That in said contract it is also provided that your orator shall receive, transmit, and deliver to all its stations and patrons in South Dakota, messages giving special warning of weather conditions whenever such special messages shall be issued by the officers of the government.

That your orator also furnishes telephones and telephone service to all officers of the United States Government at cities and towns where such officers are stationed, as well as at the several Indian Agencies situated at Ft. Yates, North Dakota, Cheyenne Agency, Yankton Agency and the Sisseton Agency in South Dakota.

That the telephone lines extending North and South through the City of Mitchell, and extending East and West through the City of Mitchell are main or trunk lines over which

a large part of such interstate and government business is transmitted.

That any interference, such as now threatened by the defendant as hereinafter set forth, with the said telephone exchange and telephone lines of your orator in and passing through the City of Mitchell will damage, hinder, and interfere with your orator in the transmission of its said interstate business, and in rendering the said service to the United States Government, to the great and irreparable damage of your orator. That to the end that your orator may not be so damaged, hindered, and interfered with in the transmission of said interstate and government business your orator seeks the relief hereinafter prayed for.

XIV.

That said defendant, the City of Mitchell, ignoring and disregarding the vested right of your orator to right of way over the streets and alleys and highways of the State of South Dakota, granted your orator by the State of South Dakota, and disregarding and ignoring the vested right of your orator to right of way over the streets and alleys of the City of Mitchell now occupied by your orator's telephone and exchange lines, secured to and vested in

your orator by virtue of the consent of said City to the original construction of said telephone and exchange lines by

your orator and your orator's grantors and assignors and ignoring and disregarding the laws of the United States and the right of your orator and your orator's grantors and assignors, and ignoring and disregarding the laws of the United States and the right of your orator thereunder to peaceably and orderly pursue without disturbance or interference, its business of receiving, transmitting and delivering interstate communications over its said telephone lines and exchange in said City of Mitchell, as well as the receiving, transmitting and delivery of the messages and communications of the United States Government, its officers and agents, as hereinbefore described and set forth, and pretending and assuming that it has a right to direct, command and enforce the removal of your orator's telephone lines and exchange from the City of Mitchell and from the streets and alleys therein, and further assuming and pretending that any rights which your orator may have had to maintain its said telephone lines and exchange in the City of Mitchell will expire on the 11th day of May, 1913, and further assuming and pretending that it has a right to terminate your orator's right to maintain its said telephone lines and exchange in the City of Mitchell, did on the 17th day of March, 1913, by its City Council in regular session assembled, pass, adopt and publish the following ordinances or resolution:

Whereas, the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange

in the city of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota being an ordinance entitled, "An Ordinance Granting to F. B. Elce, His Associates, Heirs and Assigns Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and,

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305 of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local telephone system or exchange in the city of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and,

Whereas the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the city of Mitchell, South Dakota; and,

25 Now therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of

this resolution and to remove from the streets, alleys, avenues 26 and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange of system in the City of Mitchell, South Dakota, as herein required, then the City Council

of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zeitlow, the President of said Company at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zeitlow in accordance herewith; and,

Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the president of said company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council, of the City of Mitchell, South Dakota, relative to the matter herein contained.

27 Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor.

That at the same meeting said City Council adopted, and the Mayor approved two other resolutions as follows:

Telephone Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain, and operate a local telephone exchange or system, in the city of Mitchell, South Dakota, will cease and terminate on the 11th day of May, 1913; and,

Whereas the City Council of the City of Mitchell, South Dakota, and the said Dakota Central Telephone Company have failed to agree upon the terms and conditions upon which the said company might continue to operate and maintain a local telephone exchange or system in the City of Mitchell, South Dakota, from and after the said 11th day of May, 1913; and

Whereas the City Council of said city is desirous of protecting its rights in said matter.

Now therefore, to protect its said rights and to avoid waiving said rights,

Be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called this 17th day of March, 1913, that all the officers and employees of the said City of Mitchell, South Dakota, be, and they are hereby directed and requested not to contract, either directly or indirectly, with the Dakota Central Telephone Company, for any local telephone service

from said company in the city of Mitchell, South Dakota,
28 from and after the 11th day of May, 1913, until the controversy now existing between said city and the company have

been adjusted, and they are further directed and requested to terminate, on the said 11th day of May, 1913, all relation existing on that date, between them and the Dakota Central Telephone Company relative to local telephone service furnished by said Dakota Central Telephone Company, in said city of Mitchell, South Dakota.

Adopted and approved the 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor.

Fire Alarm Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota, ceases and terminates on the 11th day of May, 1913; and,

Whereas the said Dakota Central Telephone Company has heretofore furnished the City of Mitchell, South Dakota, all necessary fire alarm service.

Now therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, that the City of Mitchell, South Dakota, purchase and install a fire alarm system for said city of Mitchell, South Dakota, to be used from and after the 11th day of May, 1913; and,

29 Be it further resolved that the city engineer of the City of Mitchell, South Dakota, be and he is hereby authorized and directed to prepare plans and specifications for a complete and adequate fire alarm system for the City of Mitchell, South Dakota, and to report said plans and specifications as soon as completed, to the city council of the City of Mitchell, South Dakota.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor.

XV.

That said defendant caused a copy of said resolutions first above set forth in Paragraph XIV, hereof, to be served on the complainant, and now threatens that if complainant does not remove its said telephone lines and exchange from the City of Mitchell, on May 11th, 1913, and cease to operate said telephone exchange and lines on said date said defendant will proceed to remove the poles and wires from the streets and alleys of said city, and further threatens that it will disconnect the telephones of complainant's subscribers in said City by cutting the wires connecting such telephones with complainant's telephone exchange. And your orator alleges that the defendant, the City of Mitchell, will, unless restrained

and enjoined by this Honorable Court, proceed to cut down, remove and disconnect the said telephone poles, lines, wires and telephones, and remove the same from the *the* streets and alleys of said City all to the great and irreparable damage of this complainant.

XVI.

And your orator further alleges and shows to the Court that the said ordinance or resolution so passed, adopted and published by said City on March 17th, 1913, was expressly intended to apply, and does in fact apply to your orator alone, and was passed, adopted and published with a view of permitting, authorizing and directing the officers and agents of said defendant city, under the guise and form of law, to cut down, remove, destroy, and ruin your orators said telephone lines and exchange so situated within said City, and with a view of preventing, hindering and obstructing your orator in the further enjoyment of the rights and franchises granted your orator by the State of South Dakota, and with a view of obstructing, hindering and interfering with your orator in the transmission of its interstate business over its said telephone lines in and through said City.

And your orator further shows to the Court that said defendant claiming and pretending that the said ordinance or resolution of March 17th, 1913, is a valid and lawful ordinance or resolution and within the powers conferred upon said City by the laws of the State of South Dakota, intend to further enforce the same by preventing your orator from operating, extending or renewing its said telephone lines and exchange within said City and threatens to prevent by force, as well as by divers and sundry legal proceedings, your orator and its officers, agents and servants from operating, extending and renewing its said telephone lines and exchanges so situated within said City, and thereby involve your orator in a multiplicity of suits.

XVII.

Your orator further shows to the Court and alleges that it has done all things required of it by the State of South Dakota to vest it, and it is now vested with a contract and property rights as well as franchises which entitle your orator to the right of way for its telephone lines over the streets and alleys and highways of the State of South Dakota, and that your orator and its grantors and assignors have done all things necessary to be done to secure and have heretofore secured the consent of the said city of Mitchell to use and occupy for telephone purposes all the streets and alleys of said City now occupied by your orator's lines of Telephone and telephone exchange. That your orator has at all times complied fully and faithfully with every regulation and requirement of said City of Mitchell, concerning the occupancy of said streets and alleys in said City for said telephone purposes, and that your orator has not done or neglected to do anything in violation of any re-

quirement or regulation of said city in the premises wherein or whereby your orator should be held to the forfeiture of any of its rights or franchises in and to the occupancy of the said streets and alleys in said City for said telephone purposes.

XVIII.

And your orator further shows and alleges that the value of its telephone lines and exchanges situated in said City of Mitchell is at least the sum of One Hundred and Ten Thousand Dollars,
32 and that the threatened removal and destruction thereof by the said defendant would damage your orator in its property in at least the sum of One Hundred and Ten Thousand Dollars beside the damage occasioned to your orator by being deprived of its said franchise and privileges granted it by the State of South Dakota, and beside the damage your orator would suffer by being obstructed in the dispatch and transmission of its said interstate business, and that therefore the amount in dispute in this cause, exclusive of costs, is at least the sum of One Hundred and Ten Thousand Dollars.

XIX.

That said Ordinance set out in Paragraph XIV, hereof, has the force and effect of a law of the State of South Dakota within the intent and meaning of Section Ten of Article One, of the Constitution of the United States. That said Ordinance so construed as a law of the State of South Dakota is a law impairing the obligation of contracts and as such will and does impair the obligation of the contracts arising between the complainant, and the State of South Dakota, and the City of Mitchell, by reason of the granting to the complainant its Charter Rights, including the right to occupy the streets, alleys, highways and public grounds of the State for telephone purposes, and the consent of the City of Mitchell to the construction of the telephone exchange and lines in the City of Mitchell, and the acceptance of such rights and privileges by complainant and by the construction of said telephone exchange and lines within the City of Mitchell, all to the great and irreparable damage of the complainant.

XX.

Your orator further alleges that the value of the telephone exchange and lines situated in the City of Mitchell, consists largely in the labor of installing the poles, wires and other apparatus. That if such telephone exchange and lines are taken down and dismantled, the salvage will be nominal, and the greater part of the value of such exchange, and lines will be destroyed. That to enforce said Ordinance of March 17th, 1913, and remove or cause to be removed, or to require the complainant to remove its said telephone exchange, lines, poles and wires from the streets and alleys

of said City, will deprive complainant of its property in said telephone exchange and lines without due process of law, and will amount to a confiscation, thereof, in violation of the Fifth Amendment to the Constitution of the United States.

XXI.

Your orator further shows to the Court and alleges that the wrongs done and threatened to be done your orator by the Defendant as hereinbefore alleged will impair your orator's contract, property, rights and franchises vested in your orator by the State of South Dakota and consented to by the said City of Mitchell, as hereinbefore alleged, and will deprive your orator of such contract, property, rights, and franchises, without due process of law, and will obstruct and interfere with your orator in the dispatch and transmission of its said interstate business in violation of the constitution and laws of the United States and of the Act of Congress regulating interstate commerce.

34

XXII.

Your orator further alleges that for the protection and preservation of its contract, property, rights, and franchises so vested in it and the protection of your orator in the peaceable and orderly dispatch and transmission of its said interstate business against the wrongs done and threatened to be done by the defendant, your orator is without remedy save in a Court of equity where matters of this kind are properly cognizable and relievable.

Now, therefore, to the end that your orator may obtain the relief to which it is justly entitled in the premises, your orator prays the Court to grant it due process by subpoena, directed to said City of Mitchell, defendant hereinbefore named, requiring and commanding it to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this your orator's bill contained. And your orator further prays that upon the final hearing it be ordered and decreed that the said ordinance or resolution passed and adopted by the City Council of said City of Mitchell, on March 17th, 1913, was not within the power of the said City Council, without authority of law, unconstitutional and void, and granting your orator a writ of injunction to be issued out of and under the seal of this Honorable Court, enjoining and restraining the defendant, City of Mitchell, its officers, agents, attorneys, and servants from in any manner enforcing or attempting to enforce the

35 said Ordinance or resolution against your orator, or from maintaining suit against your orator, the object or purpose of which shall be to enforce said ordinance or resolution. And further enjoining and restraining the defendant, City of Mitchell, its officers, agents, attorneys and servants from in any manner, other than by exercise of lawful police power, interfering with the poles, telephone lines and telephone exchange of your orator now situated in said City of Mitchell, and particularly enjoining them from cut-

ting down, removing, destroying or in any manner impairing or damaging the said telephone poles, lines and exchange so owned and operated by your orator in said City of Mitchell, or in any manner obstructing or interfering with your orator's telephone lines and facilities situated in said City used by your orator in the handling of interstate business originated in or passing through said City.

And your orator prays that a provisional or preliminary injunction may be issued, restraining and enjoining the defendant in each of the particulars aforesaid, and that your orator may have such other and further relief as may be just and equitable.

And for this your orator will ever pray.

DICK HANEY,
T. H. NULL,
Solicitors for Complainant.

NULL & ROYHL,
SPANGLER & HANEY,
Of Counsel.

36 STATE OF SOUTH DAKOTA,
County of Davison, ss:

W. G. Bickelhaupt being first duly sworn on oath says:

That he is the Secretary of the complainant, Dakota Central Telephone Company, and makes this verification in its behalf.

That he has read the foregoing Bill of Complaint, and knows the contents thereof.

That the same is true, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

W. G. BICKELHAUPT.

Subscribed and sworn to before me this 24 day of March, 1913.

[NOTARIAL SEAL.]

WM. MCGRATH,
Notary Public.

(Endorsed:) No. 5 Eq. S. D. United States District Court, District of South Dakota, Southern Division. Dakota Central Telephone Co. vs. The City of Mitchell. Bill in Equity. Null & Royhl, Spangler & Haney, Attorney for Complainant. Filed March 25, 1913. Oliver S. Pendar, Clerk.

And, to-wit: on the same day, there was issued out of the office of the clerk of said court, Equity Subpœna; which said Equity Subpœna, together with the Marshal's return of service endorsed thereon, is in words and figures the following, to-wit:

37 UNITED STATES OF AMERICA,
*Southern Division of the
District of South Dakota:*

The President of the United States of America to the City of Mitchell, a Municipal Corporation, Greeting:

You are hereby commanded to be and appear and file your answer, or other defense, in the office of the Clerk of the District

Court of the United States, for the District of South Dakota, at the City of Sioux Falls, to answer the Bill of Complaint of Dakota Central Telephone Company, a corporation organized under and by virtue of the laws of the State of South Dakota, filed against you on the 25th day of March, A. D. 1913, this subpoena is returnable into the said Clerk's office twenty days from the date hereof; hence fail not.

Witness: the Hon. James D. Elliott, Judge of the District Court of the United States, for the District of South Dakota, this 25th day of March, A. D. 1913. Issued at my office in the city of Sioux Falls, under the seal of said District Court, the day and year last aforesaid.

[SEAL OF COURT.]

OLIVER S. PENDAR, Clerk.

MEMORANDUM.—The above named defendant is required to file its answer or other defense in this suit in the Clerk's office aforesaid, on or before the twentieth day after service of this subpoena upon it, excluding the day of service thereof, otherwise the bill 38 may be taken pro confesso.

[SEAL OF COURT.]

OLIVER S. PENDAR, Clerk.

Messrs. NULL & ROYHL AND
Messrs. SPANGLER & HANEY,
Plaintiff's Solicitors.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Chancery Subpoena; together with the Bill in Equity and Order to show cause in said action, on the therein-named City of Mitchell, a municipal corporation, at Mitchell, S. D., on the 27th day of March, A. D. 1913 by handing to and leaving with A. E. Hitchcock, Mayor of said City of Mitchell, S. D., certified copies thereof.

SETH BULLOCK,
United States Marshal,
By H. F. CHAPMAN, Deputy.

(Endorsed:) No. 5 Equity, S. Div. United States District Court, District of South Dakota, Southern Division. Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant. Equity Subpoena. Returned and filed this 28th day of March, A. D. 1913. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

39 And afterwards, to-wit: on the 10th day of May, A. D., 1913, there was filed in the office of the clerk of said court, Answer; which said Answer, omitting Exhibits A, B, C and D attached thereto, is in words and figures the following, to-wit:

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District Court of the United States, District of South Dakota,
Southern Division.

Equity. No. 5 Eq.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Plaintiff,
vs.
THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*In the Matter of the City of Mitchell, Defendant, to the Bill of Complaint
of the Dakota Central Telephone Company, Plaintiff, in the
above-entitled Suit.*

Admits that plaintiff is, and since August 30th, 1904, has been
a corporation organized under the laws of South Dakota, as alleged
in the first paragraph of said Bill; that it is known as a Telephone
Company and a common carrier; that it has acquired certain lines
of telephone and telephone exchanges, and has been engaged as a
common carrier in rendering telephone service and transmitting tel-
ephone messages and communications for the general public between
cities, towns and villages and districts in and to which it has
laid one lines and exchanges.

As to whether it has rendered such service to the general public
on equal terms without discrimination throughout and between said
cities, towns, villages and districts, the defendant is without knowl-
edge.

The defendant is also without knowledge as to whether
the plaintiff is actively engaged in the operation of telephone
exchanges in about eighty-five cities and towns and has two hundred
and five telephone stations other than exchanges in the States of
South Dakota, North Dakota and Minnesota, and as to whether said
cities, towns, villages and telephone exchanges are connected by tele-
phone lines operated by plaintiff. Defendant is also without knowl-
edge as to whether said telephone system consists of about eighty-
five telephone exchanges, about two hundred sixty-five stations, and
about five thousand miles of telephone line outside of said cities
and towns. Also as to whether in the construction, purchase and
erection of said telephone lines, exchanges and stations plaintiff
expended Two Million Dollars, or any other sum.

The defendant expressly denies that the plaintiff acquired the
right-of-way for telephone purposes over the public grounds, streets,
alleys and highways within the defendant city under the provisions
of section 554 of the Code of Civil Procedure, and avers that any
right-of-way acquired by plaintiff for telephone purposes within said City
was acquired solely under and by virtue of the ordinances passed
by said City and referred to in said Bill as ordinance number 135,
ordinance number 174 and ordinance number 180, set out in said
complaint; that subject to the express terms and conditions of said
ordinances and the rights expressly granted thereby, the
defendant has during all of the times mentioned in said bill
of complaint had and exercised the exclusive control over its

streets, avenues, alleys, highways and public grounds, and still retains such exclusive control thereof.

II.

The defendant admits that it is, and during the times mentioned in said complaint was, a municipal corporation situate in Davison County, South Dakota.

III.

Defendant admits the passage and approval of ordinance number 135, set out in the third paragraph of said bill of complaint, on the 11th of May, 1898, and that under the terms and provisions thereof the said F. B. Elce installed a local telephone system in the defendant city and owned and operated the same as a local telephone exchange until June 1, 1904, and denies that he owned and operated the same later than that date, or that he used the streets, alleys, highways and public grounds of said city with poles, wires and fixtures hereafter.

IV.

Answering the fourth paragraph of said bill defendant denies that the Dakota Central Telephone lines in any manner applied to the defendant City for its consent to construct a telephone system therein about March, 1904, but it admits the passage and approval of ordinance number 174 on or about March 21, 1904, as alleged in said paragraph, and admits that the same was duly published.

V.

Answering the fifth paragraph of said complaint, the defendant denies any knowledge that said ordinance number 174 was found to be insufficient for the purposes of said Dakota Central Telephone lines, but admits that about June 7, 1904, ordinance number 180, as set out in said fifth paragraph, was duly passed, approved and published.

Further answering the said fifth paragraph, the defendant avers that about the time said ordinances numbered 174 and 180 were passed and approved, as aforesaid, said Dakota Central Telephone lines acquired the long distance telephone lines then running into the defendant City, then owned and operated by the Dakota Southern Telephone Company, but that said Dakota Southern Telephone Company had no franchise, consent or permission from the defendant City to construct, maintain or operate a long distance telephone line, or lines, within said City, and that the said ordinances numbered 174 and 180 were passed and approved in pursuance of the application of said Dakota Central telephone lines to said city for permission to construct and operate a long distance telephone line within and through said city. That said ordinance did not give to the said Dakota Central Telephone lines the right to construct or

perate a local telephone exchange within said City, but gave to said Dakota Central telephone lines only the right to construct and maintain a long distance telephone line within and through said City, and that the City did not, and never has, granted to the Dakota Central telephone lines, through said ordinances numbered 174 and 180, or otherwise, the right to construct, operate or maintain a local telephone exchange within said city.

43

VI.

Answering the sixth paragraph of said Bill, the defendant admits that prior to the adoption of said ordinances numbered 174 and 180 the Dakota Southern Telephone Company had constructed certain long distance telephone lines between the defendant city and certain other cities in South Dakota, but denies that said Dakota Southern Telephone Company had secured the consent of said City to construct or operate the same; and denies that the instruments in use in telephone exchanges and in the city of Mitchell were instruments that could not be used successfully for long distance messages; admits that improved telephone instruments had been devised for long distance messages, but denies that such instruments were only supplied to subscribers by special agreement with individual subscribers who desired instruments efficient for long distance and local messages. The defendant is without knowledge as to whether the art of telephony had so advanced that the public was demanding the installment of long distance telephones in local exchanges, and expressly denies that the Dakota Southern Telephone Company had acquired any right from the City of Mitchell to install or operate any telephone lines or system therein whatsoever or that it was operating a system of toll lines, as alleged in said paragraph.

VII.

Answering the seventh paragraph of said complaint, the defendant admits that on or about May 25th, 1904, the Dakota Central Telephone Lines entered into a contract with the said F. B. 44 Elce for the purchase from said Elce of the property of the Mitchell telephone exchange, then owned and operated in said city by him, but denies that it relied upon the consent of the defendant city as expressed in said ordinance number 174, or otherwise expressed. That the defendant is without knowledge as to whether, after entering into said contract with said Elce, said Dakota Central Telephone Lines discovered the insufficiency of said ordinance numbered 174 and applied to said city for the passage of ordinance numbered 180, or that it completed the purchase of said telephone exchange after the passage of ordinance numbered 180, but admits that after the passage of said ordinance said Dakota Central Telephone Lines on or about October 2nd, 1904, conveyed said telephone exchange, together with other exchanges, lines and properties including rights and franchises owned by it, to the plaintiff herein.

VIII.

The defendant admits the allegations of the eighth paragraph of said bill of complaint.

IX.

Answering the ninth paragraph of said Bill, the defendant denies that it desired the installation of the automatic telephone system in said city, and it is without knowledge as to whether, in order to install such system, it was necessary to put in permanent underground ways in which to place the wires and cables and otherwise install said system, and it denies that it passed an ordinance such as is set out in said paragraph.

45 It avers, however, that about April 10th, 1907, the City Council of said city passed a resolution as follows:

"Be it resolved, by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys and public grounds of said City all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone, and other improved appliances."

That said resolution was not in the form of an ordinance, nor passed and approved as such, but that it was a resolution and as such intended only to give the permission of said city to plaintiff subject to all of the conditions and provisions of said ordinance numbered 135, to place its wires and cables underneath the streets and alleys of said city, in order to avoid encumbering such streets and alleys in the congested portions thereof, and to protect said appliances from accident and from the elements; defendants denies that such permission was granted or that said resolution was adopted for the purpose to enabling plaintiff to install an automatic telephone system in said city or to extend the rights and privileges of the plaintiff within said city beyond the express terms and conditions of said ordinance numbered 135, except as herein stated.

X.

Answering the tenth paragraph of said complaint, the defendant is without knowledge as to whether after the adoption of said resolu-

tion of April 10th, 1907, plaintiff began to reconstruct and
46 extend its telephone exchange in said city, or that it under-
took under a definite plan to place its wires in the business
district of said city underground with the plan of finally installing
an automatic telephone system. Defendant admits that during the
latter part of 1912 plaintiff installed an automatic telephone system
in said city, and that the same is now largely in operation therein,
but denies that the defendant in any manner consented to or en-
couraged the installation of said automatic system. The defendant
admits that the plaintiff has erected an exchange building within

said city, but is without knowledge as to whether the same is fire-proof, or the costs thereof, or as to whether the same is in successful operation, and denies that it is the most efficient system known to the art of telephony, and that automatic telephones are in efficient use in local and long distance conversations therein. Defendant is without knowledge as to whether eleven hundred subscribers to said automatic telephone system, or any other number, are in direct communication with persons at the exchanges and stations of plaintiff's system in South Dakota, or elsewhere, as alleged in said paragraph.

XI.

Answering the eleventh paragraph of said Bill, defendant denies that plaintiff has at all times since it acquired said telephone exchange obeyed the commands, rules and regulations of the defendant in placing its poles, lines and conduits in the streets and alleys of said city, and in the operation of said telephone exchange and toll lines within said city.

47

XII.

Answering the twelfth paragraph of said complaint, defendant denies that plaintiff has, by reason of any of the things therein alleged or otherwise, acquired a vested right, or any right, to maintain and operate its said telephone exchange and lines within said city beyond the express terms and conditions of said ordinances numbered 135, 174 and 180, and it avers that the right acquired by plaintiff to operate or maintain a local telephone system or exchange within said city will, under the terms and conditions of said ordinance numbered 135, terminate and expire on the 11th day of May, 1913.

XIII.

Answering the thirteenth paragraph of said complaint, the defendant avers that it is without knowledge as to whether plaintiff now owns and operates lines of telephone as stated therein, or as to the connections therein alleged or the use that can be made of such lines by the patrons of the plaintiff in the State of South Dakota, or elsewhere, and it is without knowledge as to whether plaintiff is engaged in transmitting and delivering messages over its said lines from persons in South Dakota to persons in Minnesota, North Dakota, Iowa, and Nebraska, and in transmitting messages from persons in said States to persons within the State of South Dakota, and it is without knowledge as to the amount of tolls for such services.

48 Defendant is also without knowledge as to the alleged contract between plaintiff and the United States for the transmission of messages forecasting the weather into the State of South Dakota or to its patrons within said State, or the delivery of special messages issued by officers of the United States. It is also without knowledge as to the allegations of telephone service to the officers of the United States at the several Indian Agencies in said State and

as to whether the telephone lines extending north and south and east and west through the City of Mitchell are main or trunk lines over which a large part of interstate and government business is transmitted, and the defendant denies that the action taken by it seeking to exclude plaintiff from said city after the expiration of its franchise and rights conferred by said ordinance 135 on the 11th of May, 1913, will in any manner damage, hinder or interfere with the transmission of the interstate business of plaintiff in rendering its said service to the United States or to the damage of the plaintiff.

XIV.

Answering the fourteenth paragraph of said bill, defendant denies that it has in any manner disregarded or ignored the vested rights of plaintiff to a right-of-way over the streets and alleys within said city now occupied by said telephone exchange and lines, and denies

that it has or will ignore or disregard the laws of the United
49 States or of the State of South Dakota, or any of the rights
and privileges of the plaintiff thereunder with reference to receiving, transmitting or delivering interstate communications over its said telephone lines and exchanges, or the receiving, transmitting and delivery of messages and communications of the United States to its officers and agents; but avers that its sole purpose in passing the resolutions, copies of which are set out in the thirteenth paragraph of said Bill, was to give the plaintiff due and timely notice of the termination of its rights to operate or maintain a local telephone exchange within said city after the expiration of its rights so to do under said ordinance number 135, and to exclude its said local exchange from said city from and after said date.

Defendant admits the passage of the resolutions, as set forth in said paragraph, but denies that it has in any manner interfered with any of the rights acquired by plaintiff under the said ordinances numbered 174 and 180 to carry on and operate its said long distance telephone business, and denies any intention so to do, except insofar as plaintiff seeks to continue to operate its said local exchange within said city under the pretense that it has a vested right to continue the operation and maintenance thereof as a part of its long distance business, and the defendant expressly denies that plaintiff acquired any right from it by virtue of said ordinance number 135, or otherwise, to maintain or operate its said local exchange from and after May 11th, 1913, under said ordinances 174 and 180.

Answering the fifteenth paragraph of said Bill, the defendant admits that he caused a copy of said resolution, set forth in the fourteenth paragraph of said Bill, to be served on the plaintiff, and admits that unless the plaintiff shall comply with the provisions of said resolutions the defendant will take such steps as shall be necessary to remove said poles, wires, fixtures and apparatus from the streets, alleys, avenues and public grounds of said city as may be in use by

the plaintiff in connection with its said local exchange within said city from and after the 11th day of May, 1913.

XVI.

Answering the sixteenth paragraph of said Bill, the defendant denies that plaintiff is vested with any contract of property rights or franchises which entitle it to the right-of-way for its telephone lines over the streets, alleys and highways of said city, or that plaintiff has in any manner or form secured any consent from said city to construct, maintain or operate a local telephone exchange in said city other than the consent given in said ordinance numbered 135, and denies that plaintiff has at all times complied fully and faithfully with all of the regulations and requirements of said city relative to the occupancy of said streets and alleys for such telephone purposes, and denies that said resolution of March 17th, 1913, was passed, adopted and published with a view of permitting, authorizing or directing the officers and agents of the defendant to cut down, remove, destroy and ruin its telephone lines and exchange with a view of preventing, hindering or obstructing plaintiff in the enjoyment of any of its rights acquired under ordinances 174 and 180, or otherwise,

51 than as hereinbefore stated.

XVII.

Answering the seventeenth paragraph of said Bill, the defendant denies that plaintiff has done all things required of it by the State of South Dakota to vest it, or that it is vested, with any contract or property rights or franchises which entitle it to the right-of-way for its telephone lines over its streets, alleys and highways within said city other than as granted by said ordinances numbered 174 and 180, and denies that plaintiff, by reason of any of the things alleged in said bill or done by it, has secured the consent of said city to use and occupy the streets and alleys of said city for telephone purposes other than in the operation and maintenance of its long distance service under the authority granted by said ordinances 174 and 180. The defendant denies that plaintiff has at all times complied with the regulations and requirements of said city concerning the streets, alleys and avenues for telephone purposes, and avers that all of its rights to the use and occupancy of said streets and alleys for telephone purposes other than for long distance telephone service under said ordinances 174 and 180 will cease and expire on the 11th day of May, 1913, and it will thereafter no longer be entitled to the use or occupancy of said streets and alleys for any other purpose.

XVIII.

Answering the eighteenth paragraph of said bill, the defendant avers that it is without knowledge concerning the allegations thereof, and that insofar as the same are material the plaintiff should be required to prove the same.

XIX.

Answering the nineteenth paragraph of said complaint, the defendant denies that said ordinance set out in the fourteenth paragraph of said bill has the force of a law impairing the obligation of any contract between plaintiff and the defendant, and denies that it does in any manner impair any vested rights of the plaintiff by reason of any of the allegations contained in its bill.

XX.

Answering the twentieth paragraph of said bill, the defendant avers that it is without knowledge of the truth of the allegations of said paragraph, and that insofar as the same are material the plaintiff should be required to prove the same except that defendant denies that said ordinance of March 17th, 1913, will have the effect to deprive plaintiff of its property in said telephone exchange and lines without due process of law, or that it will amount to a confiscation thereof in violation of the fifth amendment of the Constitution of the United States.

XXI.

Answering the twenty-first paragraph of said bill, the defendant denies that any of the things done or threatened to be done by it will impair any contract between plaintiff and the defendant or any of its property rights or franchises vested in it by the State of South Dakota and consented to by the defendant, and denies that any rights have become vested in plaintiff by virtue of any of the acts of the defendant herein that will in any manner be impaired by any of the things done or threatened by the defendant, as alleged in said paragraph.

XXII.

Further answering said Bill of Complaint the defendant avers that this is not a controversy between citizens of different states; that plaintiff and defendant are both citizens of the State of South Dakota; that the matters in controversy do not arise under the constitution or laws of the United States; that it appears upon the face of the bill of complaint that the determination of the rights of the respective parties do not involve any title, right, privilege, or immunity conferred by the constitution or laws of the United States, or that will be defeated by a construction of the constitution or laws of the United States, and the suit does not arise under any law regulating interstate commerce, and this court is wholly without jurisdiction to hear, try or determine any of the issues involved herein.

XXIII.

Defendant further answering states that on or about the 11th day of May, 1898, its City Council passed and adopted said ordi-

nance number 135, and caused the same to be duly published; that pursuant thereto the said F. B. Elce constructed, operated and maintained a local telephone exchange in the defendant city under and in accordance with the terms and conditions of said ordinance until about the 1st day of June, 1904; that on or about the 25th day of May, 1904, the said Elce contracted to sell said local telephone exchange and all his rights to construct and maintain such exchange to the Dakota Central Telephone Lines; that in pursuance of said contract the said Elce, on the 3rd day of June, 1904, made, executed and delivered to the said Dakota Central Telephone
54 Lines a Bill of Sale, a true copy of which is as follows:

"Bill of Sale.

Whereas, F. B. Elce, of Mitchell, Davison County, South Dakota, for and in consideration of the sum of Eighteen Thousand (\$18,000.00) Dollars, to be paid by the Dakota Central Telephone Lines, a corporation, of Aberdeen, South Dakota, according to terms as set forth in a certain contract, dated May 25th, 1904, has sold and by these presents does grant, bargain, sell, convey, assign, transfer, and deliver to the said Dakota Central Telephone Lines, its successors and assigns, the following described property, to-wit:

The Telephone Exchange located in the City of Mitchell, S. D. known as the Mitchell Telephone Exchange, consisting of Two (2) 200 Cabinet Eureka Express Switch boards with 370 drops installed together with a distributing rack, lightning arrester and case with all the wires and cables attached thereto and strung on poles located in the city of Mitchell, S. D., together with about four hundred (400) telephones connected therewith. All of the said telephones being located within the said city of Mitchell, S. D.; also all poles and fixtures on which the aforesaid wires and cables are strung and all poles, supplies, telephones, tools and appurtenances of whatsoever nature, belonging to the said Telephone Exchange, together

55 with all the rights and privileges that have been acquired by the said F. B. Elce from the erection and operation of the

aforesaid Telephone exchange; also to transfer by warranty deed the following described real estate, lots five (5) and six (6) in block eleven (11), in M. H. Rowley's addition to the city of Mitchell, S. D.; and the said F. B. Elce does guarantee to deliver all of the above described property to the Dakota Central Telephone Lines free and clear of all incumbrances whatsoever. And the said F. B. Elce does vouch himself to be the true and lawful owner of the property and effects hereby sold and to have in himself full power and good right and lawful authority to dispose of the aforesaid property in the manner as aforesaid. And I do for myself, my heirs, executors and administrators hereby covenant and agree to defend title of the aforesaid property, as hereinbefore described, to the Dakota Central Telephone Lines, their heirs, executors, administrators and assigns against the lawful claims and demands of all persons whomsoever.

In witness whereof, I, the said E. B. Elce, have hereunto set my hand and seal this 3rd day of June, 1904.

F. B. ELCE."

O. L. BRANSON.

L. J. WELCH.

That said Bill of Sale was filed in the office of the Register of Deeds of Davison County, South Dakota, on the 6th day of July, 1904; that in pursuance of said contract and Bill of Sale the 56 said Elce, on or about the 1st day of June, 1904, delivered possession of said local telephone exchange and all his rights thereunder to said Dakota Central Telephone Lines, and that by said purchase and conveyance the said Dakota Central Telephone Lines succeeded to all the rights and privileges granted in said ordinance number 135, and became bound by all the terms, duties, obligations and conditions of said ordinance.

That the said Dakota Central Telephone Lines owned and operated said local telephone exchange in said city under and in pursuance of the terms and conditions of said ordinance number 135, until on or about the 2nd day of October, 1904, at which time it sold and conveyed the same to the plaintiff, with all the properties, rights and franchises then owned by said Dakota Central Telephone Lines, and that plaintiff by virtue of such sale and conveyance became the owner of all the rights and privileges granted in said ordinance number 135, and became bound by all the terms, duties, obligations and conditions thereof.

That since October 2nd, 1904, plaintiff has been, and it now is, the owner of said local telephone exchange, and has since said date operated and now is operating the same under and in accordance with the terms and conditions of said ordinance number 135.

XXIV.

That the plaintiff herein for a long time after the purchase of said local telephone exchange and the passage and adoption of ordinances numbered 174 and 180 made no claim that its said local exchange was not maintained and operated under the terms and conditions of said ordinance number 135, or that said 57 ordinance was in any way repealed, superseded or modified by said ordinances numbered 174 and 180, or that said plaintiff was operating and maintaining said local telephone exchange under said ordinances. But that on the contrary the said plaintiff has complied with all the terms, conditions and obligations of said ordinance number 135 except as hereinafter stated; that ever since the plaintiff has owned and operated said local telephone exchange the annual gross receipts of said telephone exchange for each of said years have exceeded the sum of \$2,400.00, and the plaintiff has voluntarily and without objection paid to the defendant city ten per cent of the said annual gross receipts above \$2,400.00, as required by Section 4 of said ordinance number 135, up to and including the years ending May 31st, 1910, except for the

years 1907 and 1908, which gross earnings charges were paid by said plaintiff under a judgment of the Circuit Court of Davison County, South Dakota, and of the Supreme Court of the State of South Dakota; that during all of said time the said plaintiff has furnished to the defendant city three telephones free of charge, as required in Section 4 of said ordinance number 135; that plaintiff has at all times complied with Section 3 of said ordinance number 135, relative to the rates to be charged by said plaintiff for telephone service in said local telephone exchange; that during the past five years the plaintiff has frequently negotiated with the defendant city for a renewal or extension of its said franchise to maintain and operate its said local telephone exchange in said city from 58 and after the 11th day of May, 1913, and the said plaintiff has made application to said defendant city for such renewal or extension, but the same has not been granted by said defendant city; that both the plaintiff and the defendant herein have at all times treated and construed said ordinance number 135 as in full force and effect and as the franchise or consent of said city under which the said plaintiff was operating and maintaining its said local telephone exchange in said city of Mitchell, and that said ordinance number 135 has in no way been repealed, superseded or modified by said ordinance numbered 174 and 180, or by the resolution of April 10th, 1907, heretofore set out, or otherwise.

Defendant further answering plaintiff's bill of complaint, and particularly the allegations of paragraphs nine and ten thereof, states that the plaintiff did not notify the defendant or any of its officers that said plaintiff desired to install an automatic telephone system in said city of Mitchell until a short time before said system was installed and that plaintiff at all the time during the time it was making said improvements set out in said paragraphs knew that the defendant city insisted that the plaintiff's franchise to maintain and operate a local telephone exchange in said city was embodied in and conferred by said ordinance number 135, and that said franchise would expire on the 11th day of May, 1913, unless otherwise renewed or extended, and that the defendant would require said plaintiff to remove from the streets, avenues, alleys and other public grounds of said city all the fixtures and appliances used by said plaintiff in operating and maintaining its 59 said local telephone exchange, on the said 11th day of May, 1913, and that with full knowledge thereof the plaintiff continued to make said improvements and that the same was so done by plaintiff with the purpose of forcing the defendant to grant plaintiff a renewal or extension of said franchise to maintain and operate a local telephone exchange in said city; that in the early part of the year 1913, the plaintiff attempted to force said automatic telephone system into the city of Mitchell regardless of the wishes of the municipal authorities of said city, by securing the consent of the individual citizens thereof to the installation of such telephones in the respective homes and business places of said citizens, and that immediately upon learning of such attempt the City Council of said city, on the 26th day of March, 1912, passed and adopted two

separate resolutions defining the attitude of said City Council and the defendant city in said matter; that true copies of said resolution are as follows, to-wit:

"Whereas, the franchise of the Dakota Central Telephone Company to use the streets, alleys and public grounds in the City of Mitchell, South Dakota, for the erection and maintenance of a local telephone system, will expire May 11th, 1913, and

Whereas, the present franchise fixes the maximum rates that the Dakota Central Telephone Company may charge for telephone services within said City as follows:

60 \$2.00 per month for business houses, and \$1.25 per month for residence houses, and

Whereas it will be necessary for the City Council of said City soon to grant a new telephone franchise to some company or person and to prescribe the terms and conditions of said franchise, and

Whereas, the City Council of said City now is, and for some time past has been engaged in a controversy with said Dakota Central Telephone Company relative to the rights of the City and the obligations of the Telephone Company regarding telephone matters and also the terms and conditions upon which a new franchise might be issued, and

Whereas, the Dakota Central Telephone Company is now attempting to evade the provisions of the present franchise by contracting with individual subscribers for automatic telephones and for different rates than prescribed in said franchise, &—

Now, therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session duly assembled this 2^d day of March, 1912;

1. That the said City Council considers it a breach of good faith on the part of the Dakota Central Telephone Company to attempt to enter into special contracts with individual citizens of the City of Mitchell relative to the kind of telephones to be installed and the rates to be charged therefor;

61 2. That said City Council considers such action on the part of the Dakota Central Telephone Company as an attempt to circumvent said Council and to force said Council into making an adjustment of said telephone matters with said Company on terms unfair to said City;

3. That said City Council considers that it has the power and authority, under the Constitution of the State and the decisions of both State and Federal Courts to grant telephone franchises in the City upon such terms and conditions as such Council shall deem best including the power to prescribe the kind of telephone service to be furnished and the maximum rates which may be charged therefor;

4. That said City Council considers that any action on the part of individual citizens in contracting with said Dakota Central Telephone Company for the kind of telephone service to be furnished and the rates to be charged therefor, will greatly hamper and embarrass the said City Council in securing the best possible adjust-

ment for the City of the telephone problems now confronting said City.

Adopted by the City Council of the City of Mitchell, this 26th day of March, 1912.

[SEAL.]

Attest:

N. H. JENSEN,
City Auditor."

A. E. HITCHCOCK, *Mayor.*

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Resolution.

"Whereas, the Dakota Central Telephone Company is attempting to contract with the individual citizens of the City of Mitchell relative to the kind of telephone service to be furnished and the rates to be paid therefor,

Now, therefore, be it resolved by the City Council of the City of Mitchell, S. D., in special session duly assembled this 26th day of March, 1912:

1. That said City Council hereby expressly disavows any consent to, or participation in, any of such contracts or proceedings, either on the part of said Telephone Company or on the part of any of the citizens of said city;

2. That said City Council shall in no manner, either directly or indirectly, expressly or impliedly, be held to consent to, or to have consented to, any agreement or contract by and between said Dakota Central Telephone Company and any of the citizens of said city relative to the kind of telephone service to be furnished the citizens of said City and the rates to be charged therefor;

3. That no contract or agreement made by and between said Dakota Central Telephone Company and any citizen of said city shall in any way be binding upon the City Council of said City, nor shall any such contract or agreement be construed to extend the scope or term of the present telephone franchise under which said Telephone Company is operating, nor to grant a new telephone franchise, nor to grant any additional rights or privileges to said Telephone Company other than the rights and privileges

63 now enjoyed by said Telephone Company under the existing franchise;

4. That said City Council hereby reserved to itself, for the benefit of the whole city, all the rights, powers, duties and authority granted to it by the constitution of the State and confirmed to it by the Courts relative to telephone matter, and said Dakota Central Telephone Company is hereby reminded that the City Council of the City of Mitchell, S. D., is the constitutional body with whom negotiations for a new telephone franchise, or for privileges in relation to the use of the streets and alleys of said City must be conducted;

5. That the City Auditor of the City of Mitchell, S. D., be, and he is hereby instructed to serve a copy of these resolutions upon said Dakota Central Telephone Company by forthwith sending to the President of said Company a copy of these resolutions, by registered mail.

Adopted by the City Council of the City of Mitchell this 26th day of March, 1912.

[SEAL.]

A. E. HITCHCOCK, Mayor.

Attest:

N. H. JENSEN,
City Auditor."

64 That the defendant has never authorized, consented to or required the installation of said automatic telephone exchange or system in said city, but that the same was installed by said plaintiff on its own initiative and without the authority or consent of the defendant.

XXV.

Defendant further answering said Bill of Complaint states that the plaintiff now is, and at all times herein mentioned has been, maintaining and operating two separate and distinct telephone systems or exchanges in said city of Mitchell, to-wit: a local telephone exchange whereby the residents of said city are enabled to communicate with each other at a flat rate per month, and a long distance system whereby the residents of said city can communicate by telephone with people residing outside and at a distance from said city, and that said long distance service is paid for according to the distance each message is sent and the length of time it requires to send such message; that said telephone exchanges or systems are entirely separate and distinct from each other; that the local telephone exchange was constructed, and is maintained and operated under the terms and conditions of said ordinance number 135, and the said long distance telephone system was constructed and is maintained and operated under the terms and conditions of said ordinances numbered 174 and 180; that the terms under which the said local telephone exchange has been and is maintained and operated expires on the 11th day of May, 1913, by virtue of the provisions of said ordinance number 135; that the resolutions set out in paragraph 14 of said Bill of Complaint were passed 65 and adopted by the City Council of said City under the terms and conditions of said ordinance number 135, and that said resolutions were intended to apply only to the said local telephone exchange now maintained and operated in said city by plaintiff, and said resolutions do not and were not intended to apply to said long distance telephone system maintained and operated in said city, and the defendant expressly denies any purpose or intention to interfere with or molest the plaintiff in the maintenance and operation of its said long distance telephone system.

XXVI.

Defendant, further answering said Bill of Complaint, states that the respective rights of the plaintiff and defendant herein relative to the matter in controversy in this action, and also the validity, scope, effect and construction of Article X, Section 3 of the South

akota Constitution, and Subdivisions 7, 9, 10 and 17, of Section 29 of the Revised Political Code of 1903, of the State of South Dakota, and of Section 554 of the Revised Civil Code of 1903 of South Dakota, and of said ordinance number 135, and of ordinance numbered 174 and 180, and the resolution passed and adopted by the City Council of the City of Mitchell on the 10th day of April, 1907, as set out in paragraphs 4, 5 and 9, respectively, of said Bill.

Complaint, have heretofore been fully determined and adjudicated by the Supreme Court of the State of South Dakota, in an action commenced in the Circuit Court of Davison County, South

Dakota, on or about the 22nd day of September, 1908,

wherein the defendant, City of Mitchell, and A. E. Hitchcock, as Mayor, Clarion D. Hardy, John McDougal, John

Michaels, P. H. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle

and C. E. Reeves as members of the City Council of the city of Mitchell, South Dakota, were plaintiffs, and the plaintiff herein

as defendant. That a true copy of the complaint in said action, marked "Exhibit A", is hereto attached and made a part of this

answer; that the said defendant duly served its answer to said complaint in said action, and that a true copy of said Answer, marked

"Exhibit B", is hereto attached and made a part of this answer;

that the plaintiffs in said action duly served its reply to the counter-

claim contained in said answer, and that a true copy of said Reply, marked "Exhibit C", is hereto attached and made a part of this

answer.

That on or about the 2nd day of December, 1908, the said action was regularly brought on for trial before the said Circuit Court of Davison County, South Dakota, and the same was duly submitted to said Court without a jury; that thereafter and in due time the said Circuit Court made and filed its findings of fact and conclusions of law therein; that a true copy of said Findings of Fact and Conclusions of Law, marked "Exhibit D" is hereto attached and made a part of this answer, as fully as if the same had been copied herein; that thereafter, on or about the 13th day of December, 1909, rendered a Judgment in said action, a true copy of which is as follows:

Judgment.

"The above entitled cause having been submitted to the Court without a jury and the Court having made and filed its findings of

fact and conclusions of law, in which the Court found that

the plaintiff was not entitled to recover on the matter sued upon, and that the defendant was not entitled to recover on

its counter-claim, and that the defendant was entitled to recover its costs and disbursements in this action,

Now, therefore, on motion of T. H. Null, attorney for defendant, it is,

Ordered and adjudged that the plaintiffs' complaint and the defendant's counter-claim herein be dismissed, and the defendant, the Dakota Central Telephone Company, recover of the plaintiff, the

City of Mitchell, its costs and disbursements in this action, taxed and allowed herein at \$21.50.

Granted December 13, 1909.

By the Court:

FRANK B. SMITH, *Judge.*

Attest:

[SEAL.] S. CATTRELL, *Clerk.*

That thereafter and in due time the plaintiffs in said action appealed to the Supreme Court of South Dakota from that part of said Judgment which adjudged that the plaintiff's complaint therein be dismissed, and that the said defendant recover of the plaintiffs its costs and disbursements in said action.

That thereafter, on the 24th day of May, 1910, the Supreme Court of the State of South Dakota rendered its Judgment in said action, wherein the decision and judgment of the said Circuit Court was reversed, and the said Circuit Court was directed to amend its conclusions of law to correspond with the decision of said Supreme Court, and to enter judgment in favor of the plaintiffs for the amount sued for in said action; that thereafter, on or about the 25th day of October, 1910, the said Circuit Court of Davison County, South Dakota, in accordance with the said direction of said Supreme Court, amended its conclusions of law and entered a judgment in favor of said plaintiffs; that true copies of said amended conclusions of law and judgment are as follows, to-wit:

Amended Conclusions of Law.

"This action having been tried at the November Term, 1908, of this Court, before the Court without a jury, and the Court having made Findings of Fact and Conclusions of Law therein, which are of record, and the Court having, on the 13th day of December, 1909, rendered judgment thereon for the defendant and against the plaintiff, for the dismissal of the plaintiff's complaint and for costs to the defendant, and in favor of the plaintiff against the defendant, for the dismissal of the defendant's counterclaim; and the plaintiff having duly appealed to the Supreme Court of the State of South Dakota, from that part of said judgment dismissing the plaintiff's complaint and awarding costs to the defendant, and the said Supreme Court having on the 24th day of May, 1910, wholly reversed that part of said judgment appealed from, and the record in this cause having been duly remitted from said Supreme Court to this Court with directions that this Court amend its conclusions 69 of law to correspond with the opinion of said Supreme Court; and due notice of such remittance having been given to the defendant as appears by the proofs now on file; and due notice of this application for these amended conclusions of law having been given and proof of such notice having been filed;

Now, therefore, in compliance with said mandate of the Supreme Court, and on motion of Lauritz Miller, Attorney for plaintiffs,

The conclusions of law heretofore made and filed in this cause are hereby amended to read as follows:

I.

That the City of Mitchell had full power and authority to impose a gross earnings or franchise charge as a condition of its consent to erect, construct or maintain Telephone lines and exchanges in the City of Mitchell.

II.

That that portion of the ordinance of May 11th, 1898, and known as Ordinance No. 138 of the City of Mitchell, South Dakota, which imposes a gross earnings or franchise charged is valid.

III.

That the ordinance of May 11th, 1898, and known as ordinance No. 135 of the City of Mitchell, South Dakota, was not repealed or modified by the Ordinance of June 7th, 1904, and known as ordinance No. 180 of the City of Mitchell, South Dakota.

IV.

That the ordinance of May 11th, 1898, and known as ordinance No. 135 of the City of Mitchell, South Dakota, was not modified or repealed by the Resolution adopted by the City Council of the City of Mitchell, South Dakota, on the 10th day of April, 1907.

V.

That the gross earnings or franchise charge imposed by the ordinance of May 11th, 1898, and known as ordinance No. 135, of the City of Mitchell, South Dakota, is a charge in the nature of a rental fee for the use of the streets and alleys of the City of Mitchell, and is not a tax within the meaning of Section 2125 of the Revised Political Code of South Dakota, of the year 1903, and Chapter 64 of the Session Laws of South Dakota for the year 1907.

VI.

That the plaintiffs are entitled to recover the amount sued for in his action.

VII.

That the payment of the gross earnings charges for the years ending May 31st, 1905 and 1906, were voluntarily made by the defendant and that said payments were not made under protest or by reason of threats or under duress.

VIII.

That the ordinance of May 11th, 1898, and known as ordinance No. 135 of the City of Mitchell, South Dakota, is a binding contract between the City of Mitchell and the defendant herein, the Dakota Central Telephone Co., and such defendant is now estopped from pleading that the condition in said Ordinance No. 135 were ultra vires the City of Mitchell, South Dakota.

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IX.

That the defendant is not entitled to recover on its counter-claim on account of the gross earnings charges paid by it for the year 1905 and 1906.

X.

That the plaintiffs are entitled to recover their costs and disbursements in this action.

Let judgment be entered accordingly.

Dated at Mitchell, South Dakota, the 25th day of October, 1910.
By the Court:

FRANK B. SMITH,
Judge of Circuit Court.

Attest:

[SEAL.] S. CATTRELL,
Clerk of Circuit Court.

Judgment.

"This action having been tried at the November Term, 1908, of this Court, before the Court without a jury, and the Court having made Findings of Fact and Conclusions of Law therein, which are of record, and the Court having, on the 13th day of December, 1909, rendered judgment thereon for the defendant and against the defendant, for the dismissal of the defendant's counterclaim;

72 and the plaintiffs having duly appealed to the Supreme Court of the State of South Dakota from that part of said judgment dismissing the plaintiffs' complaint and awarding costs to the defendant, and the said Supreme Court having on the 24th day of May, 1910, wholly reversed that part of said judgment appealed from, and the record in this cause having been duly remitted from said Supreme Court to this Court with directions that this Court enter judgment in favor of the plaintiffs for the amount found due and unpaid to said plaintiffs by the Ninth and Tenth Findings of fact of this Court, and for costs, both in this Court and in the Supreme Court; and due notice of such remittance having been given to the defendant as appears by the proof now on file; and due notice of application for this judgment having been given, and proof of such notice having been filed:

Now, therefore, in compliance with said mandate of the Supreme

urt and on motion of Lauritz Miller, attorney for the plaintiffs, It is ordered and adjudged that the plaintiffs, the City of Mitchell, D. Hitchcock as Mayor, Clarion D. Hardy, John McDougal, P. H. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle and C. E. Reeves members of the City Council of the City of Mitchell, South Dakota, have and recover of the defendant, Dakota Central Telephone Co., the sum of Two Thousand Sixty Six Dollars and Thirty Two Cents (\$2,066.32), principal and interest, together with the sum of One Hundred Twenty Six Dollars (\$126.00) costs on appeal, and the sum of \$21.50 Dollars costs in this Court, which costs shall be taxed by the Clerk of this Court and by him inserted herein, and that the defendant's counter claim be and the same is hereby dismissed.

Dated at Mitchell, South Dakota, the 25th day of October, 1910.

By the Court:

FRANK B. SMITH, Judge.

Attest:

[SEAL.] S. CATTRELL,
Clerk of Circuit Court.

That said amended conclusions of law and judgment stands unversed and is now the law relative to said matters:

That the Supreme Court of South Dakota in said Judgment and decisions, determined and adjudicated as follows, to-wit:

1. That the said Section 3, Article X of the Constitution of South Dakota, as heretofore set out, granted to the defendant city the right grant or to refuse to grant to telephone companies the privilege franchise for establishing telephone systems within said city, upon such terms and conditions as said city may choose to impose, and that such companies cannot accept the grant and refuse to comply with the conditions upon which such grant was made.

2. That Subdivisions 7, 9, 10 and 17, of Section 1229, of the Revised Political Code of 1903, of South Dakota, as hereinbefore set out, gave to the defendant city the exclusive control over its streets and alleys.

3. That Section 554 of the Civil Code of 1903, of South Dakota, as set out in paragraph 1 of complainant's bill of complaint herein, is modified by the said Section 3, Article X, of the South Dakota Constitution, and the Subdivisions 7, 9, 10 and 17 of Section 1229 Political Code of 1903, and as so modified said statute did not give to complainant the right of way over the streets, alleys and other public grounds in said city of Mitchell, exclusive of the consent of said city.

4. That Ordinance No. 135 as set out in paragraph 3 of complainant's bill of complaint herein, is a valid and existing ordinance, and the same is a valid contract between the complainant and defendant herein, and the said complainant is operating its said local telephone exchange under said ordinance and is bound by the terms and conditions of said ordinance.

5. That Ordinance No. 180, as set out in paragraph 5, of Complainant's Bill of Complaint herein, did not repeal, qualify, or modify

said Ordinance No. 135, and did not give to the complainant the right to construct, maintain and operate a local telephone exchange in said city of Mitchell, but that the same only gave said complainant the right to construct, maintain and operate a long distance telephone system.

6. That said Resolution passed and adopted by the City Council of the City of Mitchell on the 10th day of April, 1907, as set out in paragraph 9 of Complainant's Bill of Complaint herein, did
 75 not repeal, amend or modify said ordinance No. 135 and did not give the plaintiff any additional rights to construct, maintain and operate a local telephone exchange in said city, other than granted in said ordinance No. 135, but that said resolution simply gave plaintiff permission to place its wires underground instead of stretching said wires on poles.

That said Judgment and decision is a full adjudication of the said matter and is binding upon the plaintiff and defendant herein, and upon this court, and the plaintiff is and ought to be estopped from litigating any of the matters so adjudicated in this suit.

XXVII.

That as heretofore alleged, defendant is without knowledge as to whether plaintiff operates its long distance telephone lines beyond the borders of the State of South Dakota, but it avers that plaintiff's principal business is that of operating local and long distance exchanges within said State, and that any business or connections it may have outside is wholly incidental to its said business within the State of South Dakota; that its local exchange in the defendant city has been and can be operated wholly independent of any of its long distance connections either intra or inter state, and the defendant does not by the ordinances complained of, or otherwise, intend to interfere with any of the long distance operations of plaintiff or with its interstate business or with any agreement it may have with the

United States or any person or corporation.

76 That the plaintiff has, since operating said local exchange in the defendant city, as well as its long distance lines, applied to the Board of Railroad Commissioners of South Dakota to fix and regulate its rates within said State, and that on the 17th of March, 1913, it applied to said Board of Railroad Commissioners to fix and establish rates in said city as follows:

"ABERDEEN, S. D., M'ch 17, 1913.

To the Honorable Board of Railroad Commissioners, of the State of South Dakota, Pierre, S. D.

GENTLEMEN: In accordance with Sec. 10, of Chap. 207 of the 1911 Session Laws, we, hereby, file the following rates; the same to become effective May 12th, 1913, and applying at Mitchell, S. D.:

Long Distance Automatic Telephone Rentals.

Main Line Business rate.....	\$3.25	pr.	Mo.
Main Line Residence rate.....	2.25	"	"
Four Party Residence rate.....	1.75	"	"
Calling & Talking Extensions.....	1.00	"	"
Talking Extensions.....	.50	"	"

Private Branch Exchange:

For each Main Line Trunk.....	3.00 pr. Mo.
For each Station connected to the Private Branch Exchange50 pr. Mo.

77 A discount of 25¢ per month to be made on all rentals paid at our office in the city of Mitchell, on or before the 10th of the month for the current month's rental, except extension telephones and private branch exchanges, which will be net.

Yours truly,

DAKOTA CENTRAL TELEPHONE CO.,
By W. G. BICKELHAUPT, Sec'y."

By reason of all of the things hereinbefore alleged, and especially because plaintiff has operated its said local exchange in the defendant city under the terms and provisions of said ordinance No. 135, and has complied with the conditions thereof, and because it has acquired no other right to maintain or operate its said local exchange within said city, and because of the adjudication of the matters involved in the litigation between it and the defendant in the Circuit and Supreme Courts of South Dakota, as before alleged, and because it has applied to said Board of Railroad Commissioners to fix and allow its rates within said city, plaintiff is now and ought to be estopped from litigating the matters in controversy between plaintiff and the defendant in this suit, and from asserting any right to operate or maintain the local telephone exchange within said city beyond the express terms and conditions of said ordinance No. 135 from and after the 11th day of May, 1913, and from in any manner preventing the defendant from insisting upon and causing the immediate exclusion of its said local telephone exchange from said city on and after said date, and from requiring

78 it to vacate its streets, alleys, highways and other public grounds now occupied by it, and from in any manner hindering or delaying the defendant in the proper discharge of any of its duties and functions as a municipal corporation.

Wherefore, the defendant prays that plaintiff's bill of complaint be dismissed; that the restraining order heretofore granted by this Court in this suit be vacated; that the plaintiff be decreed to have no right whatsoever to operate or maintain its local telephone exchange within the defendant city from and after May 11th, 1913; that it be granted such further relief in the premises as the Court shall deem equitable, and that it recover its reasonable costs and disbursements herein.

LAURITZ MILLER,
EDWARD E. WAGNER,
Solicitors for Defendant.

(Exhibits A, B, C and D are omitted here pursuant to præcipe.)

(Endorsed:) Eq. 5 S. D.—United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone

Company, a corporation, vs. City of Mitchell, a municipal corporation—Answer—Filed May 10th, 1913, Oliver S. Pendar, Clerk, by Louis B. Trott, Deputy.

79 And, afterwards, to-wit: on the 10th day of September, A. D. 1915, there was entered and appears of record in Equity Journal, Vol. 2, Southern Division of said Court, and filed in the office of the clerk of said court on the 14th day of September, A. D. 1915, Decree; which said Decree is in words and figures the following, to-wit:

United States District Court, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant,
vs.

THE CITY OF MITCHELL, a Corporation, Defendant.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed, that the complainant, Dakota Central Telephone Company is now and since June 7th 1904, has been rightfully and lawfully maintaining and operating under the rights and privileges granted to the Dakota Central Telephone Lines (inc) by Ordinance No. 180 of the City of Mitchell, South Dakota, two separate and distinct telephone systems, one for local and one for long distance or toll line purpose, in the City of Mitchell, South Dakota.

It is further ordered, adjudged and decreed, That, that certain resolution passed, adopted and approved by the city council and Mayor of the City of Mitchell, South Dakota, on the 17th day of March, 1913, and which resolution was in words and figures

80 as follows:

Telephone Resolution.

Whereas, the Dakota Central Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the erection and Maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and

Whereas, The rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913, and,

Whereas, The Dakota Central Telephone Company has failed and

refused to accept the terms and conditions of Ordinance No. 135, of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and

Whereas, The said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, and

81 Now, Therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of said resolution, and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and

82 operation of its local telephone exchange or system in the city of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zeitlow, the President of said Company at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zeitlow in accordance therewith; and

Be it further resolved that the mailing of a copy of this resolution to the City Auditor to the President of said Company as herein requires, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council of the City of Mitchell, South Dakota, relative to the matter herein contained.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor."

83 was and is unconstitutional and void, in that it impairs the obligation of the contract contained in Ordinance No. 180 of the City of Mitchell, South Dakota, in violation of Section 10, Article 1 of the United States Constitution, and deprives the complainant of its property without due process of law, in violation of Section 1, Article 14 of the United States Constitution.

It is further ordered, adjudged and decreed, that the defendant City of Mitchell, its officers, agents, attorneys and servants be and are hereby until June 7th, 1924, enjoined and restrained from in any manner, whether by force or by suit or legal proceedings of any kind or character, enforcing or attempting to enforce said resolution passed, adopted and approved by the City Council and Mayor of the City of Mitchell, South Dakota, on the 17th day of March, 1913.

It is further ordered, adjudged and decreed, that the defendant City of Mitchell, its officers, agents, attorneys and servants, be and are hereby until June 7th, 1924, enjoined and restrained from in any manner, otherwise than by the exercise of lawful police power, interfering with the poles, telephone lines, conduits and telephone exchange, now owned, maintained and operated by the complainant in said City of Mitchell, South Dakota, and particularly from cutting down, removing, destroying, or in any manner impairing or damaging, the said telephone poles, lines, conduits and exchange, so owned and operated by complainant in said City of Mitchell, South

Dakota, except that this shall not be construed to authorize 84 this complainant to maintain poles and pole lines on Main Street, Park Avenue, Fourth and Fifth Streets.

It is further ordered, adjudged and decreed, that the complainant Dakota Central Telephone Company have and receive of the defendant City of Mitchell, South Dakota, its costs and disbursements in this suit, taxed and allowed herein at — Dollars.

Jurisdiction of this suit is hereby reserved for such further decree, to be entered at the foot of this decree, as may be necessary to fully protect and preserve the rights of the parties hereto.

By the Court:

[SEAL OF COURT.]

WILBUR F. BOOTH, *Judge.*

Attest:

OLIVER S. PENDAR, *Clerk.*

The defendant hereby excepts to the rendition and entry of the above and foregoing decree, which exception is hereby allowed.

Dated September 10, 1915.

[SEAL OF COURT.]

WILBUR F. BOOTH, *Judge.*

Attest:

OLIVER S. PENDAR, *Clerk.*

(Endorsed:) # 5, S. D. Equity. Dakofa Central Telephone Co. vs. City of Mitchell. Decree. Filed September 14, 1915. Oliver S. Pendar, Clerk.

85 And, afterwards, to-wit: on the 14th day of July, A. D., 1915, there was filed in the office of the clerk of this court, Opinion of the Court; which said Opinion is in words and figures the following, to-wit:

United States District Court, District of South Dakota, Southern Division.

In Equity.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant,
vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

The above entitled cause coming regularly on for final hearing, Thomas H. Null, Esq., and Dick Haney, Esq., appeared in behalf of complainant. Lauritz Miller, Esq., and E. E. Wagner, Esq., appeared in behalf of defendant.

The suit is in equity brought for the purpose of enjoining the defendant from enforcing the provisions of a certain resolution or ordinance passed by defendant on the 17th day of March, 1913; and further, enjoining the defendant, its officers and agents from interfering with the poles, telephone lines and appurtenances of the complainant, situated in said City of Mitchell.

Diversity of citizenship does not exist between the parties, and jurisdiction is asserted solely because the controversy is claimed to be one arising under the Constitution of the United States. The action on the part of the defendant which is complained of and sought to be restrained, is claimed by complainant to be in 86 violation of Article One, Section ten, of the Constitution of the United States; and also of the due process clause of the 14th amendment to said constitution.

The facts in the case are largely undisputed. From the stipulation of facts entered into by the respective parties, from the admissions in the pleadings, and from the evidence offered upon the hearing, the following facts appear:

The complainant is, and since the 30th day of August, 1904, has been a corporation organized under the laws of the State of South

Dakota, and is empowered and authorized to purchase, construct and operate telephone lines and exchanges in said State. The defendant is a municipal corporation, situated in the County of Davison and State of South Dakota.

On or about May 11, 1898, the city council of the City of Mitchell duly passed and adopted, and the mayor of said city approved, the following ordinance known as Ordinance No. 135.

Ordinance No. 135.

"An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said City, the said F. B. Elce, his asso-

cates, heirs and assigns are hereby granted the right to the

87 use of the streets, alleys and public grounds of the said city of Mitchell, S. D., for the creation and maintenance of a public telephone system for the term of fifteen years from the date of the adoption or approval of this ordinance.

Section 2. That for such purpose the said F. B. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said city of Mitchell and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system. Provided, that such poles, wires and appliances shall not be placed so as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines of poles, wires, and other appliances, shall be located as far as possible in the alleys of said City. Provided further, that in no case shall the poles, wires and other appliances be placed on Main Street, except for the purpose of crossing said Main Street, upon the streets running east and west. It is also provided that the said City Council shall have the right to direct the location of all poles and lines of wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the City Council of the said City of Mitchell.

88 Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval of this ordinance, have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs and assigns, shall provide a suitable and convenient place for a central office, and shall maintain such office in operation during the business hours of each day during the year and at such other times as the business may demand, and the maximum rent for

the said paying telephones established under this ordinance shall not exceed two dollars per month for business houses and one dollar and twenty five cents per month for residence houses for service within the city limits of the city of Mitchell; Provided, that if the said F. B. Elee, his associates, heirs and assigns shall fail or neglect to have at least twenty telephones in successful operation at the expiration of six months from the adoption and approval of this ordinance then this ordinance shall be null and void, and all rights and privileges granted thereunder revoked.

Section 4. That in consideration of the said City of Mitchell granting to the said F. B. Elee, his associates, heirs and assigns, the right and privilege to use the streets, alleys and public grounds of the said City of Mitchell, for the erection and maintenance of a public telephone system, the said F. B. Elee, his associates, heirs and assigns shall erect and maintain three telephones at such places as the City Council shall direct, and that the said three telephones shall be furnished to the said City during the term of fifteen years without cost or expense to the City of Mitchell; Provided, also, that at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of Two Thousand Four Hundred Dollars (\$2,400.), the said F. B. Elee, his associates, heirs and assigns, shall pay to the City of Mitchell ten per cent of the amount in excess of Two Thousand Four Hundred Dollars (\$2,400) received as gross receipts from the said telephone system, which said sum shall be paid to the City at the end of each and every year, and the City Council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elee, his associates, heirs and assigns.

Section 6. That if the said F. B. Elee, his associates, heirs and assigns shall fail to comply with any of the provisions of this ordinance then the City Council of the City of Mitchell shall have the power to declare the privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intentions shall be given by the said City Council to said F. B. Elee, his associates, heirs, and assigns, and a reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and approved May 11th, 1898.

THOMAS FULLERTON, Mayor.

Attest:

J. K. SMITH,
City Auditor.

Pursuant to said ordinance said F. B. Elee installed a local telephone system in the City of Mitchell, and occupied the streets,

alleys and public grounds of said city in connection therewith; and owned and operated said telephone exchange until about May 91 25, 1904, on which last mentioned date a contract of sale covering said telephone exchange and appurtenant property was entered into between said F. B. Elce and the Dakota Central Telephone Lines, and said sale was finally consummated July 6, 1904.

The Dakota Central Telephone Lines on and prior to May 25, 1904, was a corporation duly organized under the laws of the State of South Dakota, and was authorized to acquire and operate in the State of South Dakota telephone lines, both those known as long distance lines, and those known as local exchange lines.

On or about March 21, 1904, the city council of the City of Mitchell adopted and passed, and the mayor approved an ordinance in words and figures as follows:

Ordinance No. 174.

An ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns the right to erect poles and fixtures, and to string wires for the purpose of operating long distance telephone lines, within and through the city of Mitchell, South Dakota.

Be it ordained by the council of the City of Mitchell, South, Dakota,

Section 1. That there is hereby granted the right and privilege given to the Dakota Central Telephone Lines, (Inc.) their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main Street, Park Avenue, Fourth Street and Fifth Street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens 92 of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of the street commissioner, or a committee appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways, or shade or ornamental trees in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the city of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said city of Mitchell reserves the right to grant the

rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the city of Mitchell, S. D. shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect from and after the date of passage and approval.

Passed March 21st, 1904.

Approved:

J. L. HANNETT,
Act'g Mayor.
J. G. MARKHAM, *Auditor.*

or about the 7th day of June, 1904, the city council of the City of Mitchell adopted and passed, and the mayor of said city duly approved an ordinance in words and figures as follows:

Ordinance No. 180.

Ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns, the right to erect poles and fixtures and to string wires for the purpose of operating a long distance telephone system within and through the city of Mitchell, South Dakota.

It is ordained by the city council of the city of Mitchell, South Dakota,

Section 1. That there is hereby granted the right and privilege, to the Dakota Central Lines, (Inc.), their successors or assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets, at right angles, where it is necessary, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of the city of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices, with parties residing in, or at a distance from Mitchell, and all such rights to be conditioned on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said city of Mitchell; and are not to interfere with the flow of water in any main, or gutter in said city of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may

be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

95 Section 5. In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect from and after the date of its passage and approval.

Passed June 6th, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, *Mayor.*
J. G. MARKHAM, *Auditor.*"

Some years prior to 1904 the Dakota Southern Telephone Company, a co-partnership, had constructed long distance telephone lines running into the City of Mitchell; but it does not appear that any formal consent thereto has ever been given by the city of Mitchell. In 1903, the Dakota Central Telephone Lines purchased these long distance lines from the Dakota Southern Telephone Company.

From the time of the purchase by the Dakota Central Telephone Lines of the local exchange from Elce, up to the 2nd of October, 1904, said Dakota Central Telephone Lines operated said local telephone exchange; and from the time of the purchase of the long distance lines from the Dakota Southern Telephone Company until the 2nd day of October, 1904, the Dakota Central Telephone

96 Lines operated the long distance lines thus purchased.

On October 2, 1904, complainant the Dakota Central Telephone Company purchased from the Dakota Central Telephone Lines both the local telephone exchange and the long distance lines, and since the last mentioned date the complainant has owned and operated the same, together with additions thereto constructed by the defendant. No formal consent, however, has ever been obtained from the City of Mitchell by the complainant to construct or operate a long distance telephone system within the corporate limits of said City of Mitchell, except as such consent may be contained in ordinances 174 and 180.

On or about April 10, 1907, the city council of said City of Mitchell duly approved a resolution in words as follows:

"Be it resolved by the city council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors and assigns, to place, construct and maintain, through and under the streets, alleys and public grounds of said city such conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public

general, communication by telephone and other improved appliances."

Prior to 1912 the complainant constructed in said city a fireproof telephone exchange building, which has been in use ever since; and during the latter part of the year 1912 and the first part of the year 1913, complainant installed in said City of Mitchell an automatic telephone system for local use. The installation of this automatic telephone system, however, was without request or consent on the part of said city. On March 17th, 1913, the City of Mitchell by its said council in regular session, passed, adopted and published, and the mayor duly approved, the following resolutions:

Telephone Resolution.

Whereas, the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the city of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, His Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. Dak., for the Erection and Maintenance of a Public Telephone System." and adopted the 11th day of May, 1898; and,

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305 of the City of Mitchell, S. Dak., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local telephone system or exchange in the city of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and

Whereas the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the city of Mitchell, South Dakota;

Now Therefore, be it hereby resolved by the City Council of the city of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the city of Mitchell, South Dakota, from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Com-

pany be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and

99 description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, and

Be it further resolved that the said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of this resolution and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of the same by registered mail to J. L. W. Zeitlow, the President of said Company, at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said

100 J. L. W. Zeitlow in accordance herewith; and
Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the president of said company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council of the City of Mitchell, South Dakota, relative to the matter herein contained.

Approved and adopted this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor.

Telephone Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain and operate a local telephone exchange or system, in the City of Mitchell, South Dakota, will cease and terminate on the 11th day of May, 1913; and

Whereas, the City Council of the City of Mitchell, South Dakota, and the said Dakota Central Telephone Company have failed to agree upon the terms and conditions upon which the said company might continue to operate and maintain a local telephone exchange

or system in the City of Mitchell, South Dakota, from and after the said 11th day of May, 1913, and,

101 Whereas the City Council of said city is desirous of protecting its rights in said matter;

Now therefore, to protect its said rights and to avoid waiving said rights,

Be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called this 17th day of March, 1913, that all the officers and employees of the said City of Mitchell, South Dakota, be, and they are hereby directed and requested not to contract, either directly or indirectly, with the Dakota Central Telephone Company, for any local telephone service from said company in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913, until the controversy now existing between said city and the company has been adjusted, and they are further directed and requested to terminate, on the said 11th day of May, 1913, all relation existing on that date, between them and the Dakota Central Telephone Company relative to local telephone service furnished by said Dakota Central Telephone Company, in said City of Mitchell, South Dakota.

Adopted and approved the 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor.

Fire Alarm Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota, ceases and 102 terminates on the 11th day of May, 1913; and

Whereas, the said Dakota Central Telephone Company has heretofore furnished the City of Mitchell, South Dakota, all necessary fire alarm service.

Now Therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, that the City of Mitchell, South Dakota, purchase and install a fire alarm system for said City of Mitchell, South Dakota, to be used from and after the 11th day of May, 1913; and,

Be it further resolved that the city engineer of the city of Mitchell, South Dakota, be and he is hereby authorized and directed to prepare plans and specifications for a complete and adequate fire alarm system for the City of Mitchell, South Dakota, and to report said plans and specifications as soon as completed to the City Council of the City of Mitchell, South Dakota.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor."

Under the system established by complainant since its purchase of the long distance lines and the local telephone exchange from the Dakota Central Telephone Lines, subscribers in the City of Mitchell are charged a flat rate per month for telephone exchange facilities furnished for communicating with each other, but are charged special rates or tolls for each long distance message transmitted. Said subscribers are enabled to transmit long distance messages from, and to receive long distance messages at their own local telephones, connection being made between the local exchange wires and the long distance wires, by means of an operator at the telephone exchange. Not all of the subscribers use the long distance facilities furnished; some make use of the local exchange exclusively, but long distance facilities are open to all subscribers upon equal terms.

Other facts, either as stipulated, or as they appear from the evidence, will be referred to later.

The main question in the case, apart from the question of jurisdiction, is as to the proper construction of ordinances 174 and 180 and, inasmuch as the two ordinances are substantially identical with the exception of a few words contained in the later ordinance, the former ordinance No. 174 is of value mainly by way of reference or comparison.

The construction of ordinance 180 contended for by the complainant is, that said ordinance granted to complainant a franchise to operate and maintain not merely long distance telephone lines so called, through the City of Mitchell, but also a local telephone exchange within said city. The defendant contends that the ordinance in question gives to the company merely the right to construct and maintain a long distance telephone system, as distinguished from a local exchange.

104 Before taking up the question of the proper legal construction of said ordinance, it may be advisable to take up and dispose of certain preliminary questions raised by one or the other of the parties.

Involved in the case is not merely the proper legal construction of ordinance No. 180, but also the extent of the powers of the City of Mitchell in passing the several ordinances and resolutions hereinbefore referred to. As bearing upon this question, the following provisions of the constitution of the State of South Dakota, and of the statutes of said State are pertinent.

Section 3 of Article 10 of the State constitution provides that "No telephone line shall be constructed within the limits of any village, town or city, without the consent of its local officers."

Sec. 554 of the Civil Code of the State provides:

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys, and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys, or highways said lines shall run over or across, and the place the poles to support the wires are located; the right of way over

real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations."

Section 1229 of the Political Code of the State provides:

105 The City council shall have the following powers:

Subdivision 7. To lay out, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same."

Subdivision 9. To regulate the use of the same.

Subdivision 10. To prevent and remove obstruction and encroachments upon the same.

Subdivision 17. To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, telegraph or telephone poles, horse troughs, racks, posting hand-bills and advertisements."

One of the contentions of the complainant is, that as soon as the consent to enter the city was granted by ordinance 180 and the later resolution of 1907, then and thereafter, under the provision of Sec. 554 of the Civil Code above cited, complainant was subject to municipal control only as to what grounds, streets, alleys and highways it should occupy, and as to what places the poles should be located on. In other words, "Consent having been given, the right of the city to control telephone companies results from the statute, and not from the ordinance resolution, or action of the local authorities by which the consent is manifested, and consent once given cannot be revoked." This doctrine relied upon by the complainant, was announced by the Supreme Court of said State, In Missouri River Tel. Co. v. City of Mitchell, 116 N. W. 67, and as applied to the facts of that case may not be open to criticism.

It cannot, however, be doubted that under a later decision 106 of the Supreme Court of South Dakota, a city may grant a

telephone franchise to a company, with various conditions annexed. In the case of City of Mitchell v. Dakota Central Telephone Co., 127 N. W., 582, the Court in its opinion, after referring to the various sections of the constitution and statutes above quoted, uses the following language:

"It is quite apparent from this section of the Constitution that there is reserved to the municipality the right to grant or refuse to grant to telephone companies the privilege or franchise for establishing a telephone system within the municipality, and that it necessarily follows that, if it had the right to refuse to grant such franchise or privilege, it necessarily has the right to grant the same upon such terms and conditions as it may choose to impose, and, if the telephone company accepts the conditions, they become binding upon the company. Such company cannot accept the grant and proceed to install their plant and refuse to comply with the conditions upon which the grant was made."

In the case of City of Vermillion v. Northwestern Telephone Co., 189 Fed. 289, the Circuit Court of Appeals for the 8th circuit, speaking through Judge Amidon, referring to the above quoted provisions from the State constitution and statutes, in a case similar to the one at bar, said:

107 "Counsel for appellee contends that the consent of the city is confined by the Constitution to the "construction" of telephone line, that the franchise to use the streets is derived from the state, and that it was not competent for the city to limit the privilege to a term of 10 years, as was attempted in the Cotterell ordinance. We cannot accept this position. The Constitution vested the city with an absolute discretion as to the terms upon which it would give its consent. A limitation of the period for which the privilege should be enjoyed was not only within the provisions of the Constitution, but was also justified by the highest wisdom as a proper protection of the rights of the city in its streets. Such limitations are at the present time a prominent feature of sound municipal action." And again—

"The right to use the streets, which the statute purports to give being conditioned by the Constitution upon obtaining the consent of the municipal authorities, the source of the beneficial right would seem to be the city rather than the state."

To the same effect see Andrews v. National Foundry, 61 Fed. 782; Blair v. Chicago, 201 U. S., 400; Ghee v. Northwestern Union Gas Co., 158 N. Y. 510.

It results from the foregoing considerations that ordinance 133 was valid as to its conditions that it expired by limitation of time in May, 1913, and that whatever rights the complainant had 108 to maintain its poles, wires and telephone system in the streets of the city of Mitchell at the present time, must be derived from the ordinance 180 and the resolutions of 1907, construed in the light of the provisions of the constitution and the statutes hereinbefore quoted.

Another preliminary question is this: whether the legal construction of ordinance 180 is open for consideration and decision by this court at this time. It is claimed on the part of the defendant that the question of the legal construction of ordinance 180 is res adjudicata; and it bases its contention upon the decision in the case of the City of Mitchell v. Dakota Central Telephone Company above cited. Defendant claims that it was expressly decided in the case cited that ordinance No. 180 did not grant to complainant a franchise for a local telephone system.

It may well be doubted whether a construction of ordinance 180 as claimed by the defendant, even if announced by the State Court, would prevent independent inquiry as to the proper construction of the ordinance by this court in a case of the character of the one at bar. While the question of the construction of a State statute or of an ordinance is, generally speaking, for the State Courts to decide in the first instance, and the construction adopted by the State court is, as a rule, binding upon the federal court; yet, whenever the question arises in the federal court whether State legislation has impaired the obligation of a contract, and the contract set up is contained in a State statute, or in an ordinance, then the federal 109 court will exercise an independent judgment in determining as to the existence of such contract, and the proper construction to be placed upon it.

In the case of Mobile & Ohio R. Co. v. Tennessee, 153 U. S., 486, the court in its opinion, speaking in reference to this question said:

"It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

In the case of Mercantile Trust Co. v. City of Columbus, 203 U. S., 311, the Court in its opinion used the following language:

"It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the state legislature, which impairs its obligation."

And again, in the same opinion:

"It cannot be determined that there is an impairment of the obligation of a contract until it is determined what the contract is, and whether it is a valid contract. If it be valid, it still remains to be determined whether the subsequent proceedings of the city council and legislature impaired its obligations."

In the case of Perry Co. v. Norfolk, 220 U. S., 472, the Court said in its opinion, on page 479:

"This court, therefore, has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

The same rule is recognized in the late case of Milwaukee Electric Light Co. v. R. R. Comm. of Wisconsin, in an opinion handed down June 14, 1915, the court using the following language:

"It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no State shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract, and the extent of its binding obligation, and parties are not concluded in these respects by the determination and decisions of the courts of the States. While this is so, it has 111 been frequently held that where a statute of a State is alleged to create or authorize a contract inviolable by subsequent legislation of the State, in determining its meaning much consideration is given to the decisions of the highest court of the State."

Furthermore, careful analysis of the case relied upon (City of Mitchell vs. Telephone Co. supra) leads to the conclusion that there was not involved, either in the controversy, or in the decision of the court, the exact question involved in the case at bar. The real

question as to ordinance 180 involved in that case was, whether ordinance 180 had superseded ordinance 135, so that the earnings tax imposed under ordinance 135 could no longer be collected. Three reasons were given why ordinance 180 did not supersede ordinance 135. First, that there was no express repeal of ordinance 135 contained in ordinance 180; second, that repeals of ordinance by implication are not favored; third, that the two ordinances 135 and 180 did not cover so exactly the same field of scope, that it could be fairly said that the city intended by the passage of ordinance 180 to repeal ordinance 135. Something further will be said later in respect to the scope of these two ordinances.

It may be well to state at this point that a considerable part of the testimony taken by the parties respectively as bearing upon the construction of said ordinance is, in my opinion, incompetent and should be eliminated from consideration. For example, testimony 112 by former members of the City Council as to what the intention or understanding of the city council was, or by officers of the telephone company as to their understanding of the language used in the ordinance.

In the case of City of Vermillion v. Nat. Tel. Ex. Co., 189 U.S. 289, the Court said:

"Counsel for the city urges that extraneous evidence should be received to show that the resolution was intended to cover a three-line only. But the meaning of municipal ordinances, like of legislative acts, must be ascertained from their language."

For a similar reason, certain ordinances which were offered in evidence by other cities, and testimony as to what was done under them, must also be excluded.

Ordinance No. 180.

The title of the ordinance is as follows:

"An ordinance to grant permission to the Dakota Central Telephone Lines (Incorporated) their successors and assigns, to erect poles and fixtures, and to string wires for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota."

The words "system," "within" and "through" contained in the title are significant; and taken together would seem to indicate that something more was intended to be granted than a mere right to carry long distance telephone wires through the city. In section 113 one of the ordinance is granted the right and privilege to erect poles and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park Avenue and Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets at right angles, where it is necessary." This language of the ordinance is broad and comprehensive, and certainly capable of a construction broad enough to cover the erection and maintenance of a local exchange.

Again, in the same section is the following language: "for

plying the citizens of the City of Mitchell, and the public in general, facilities to communicate with parties residing in, near or at a distance from Mitchell." The words "in," and "near" are as important as the words "at a distance from," and cannot be disregarded in construing the section in question. It would be unreasonable to suppose that a right was granted to the telephone company to erect and operate a telephone system by which a citizen of Mitchell living near the city limits could talk over the telephone line with a party living ten rods distant, but outside of the city limits, but that said citizen could not talk with another citizen within the city over the telephone line, though the last named party were distant many times as far as the person outside of the city limits. In order that the construction of the defendant may prevail, it would be necessary to practically eliminate the words "in" and "near" from said section. But it is one of the cardinal rules of construction of ordinances that all words contained therein shall if possible be given full force and effect.

114 The defendant, however, relies upon the expression "long distance telephone" contained in said section, as indicating a purpose on the part of the city not to grant permission to the telephone company to maintain and operate under said ordinance a system whereby the citizens of Mitchell could communicate by telephone with each other. Much testimony has been introduced, without objection, on the part of the respective parties to this suit, touching the meaning of the words "long distance telephone." The testimony of the various witnesses has developed the fact that the words in question had at the time of the passage of ordinance 180 several different and distinct meanings. According to the testimony of some of the witnesses, the words indicated telephone communication by improved or more powerful transmitters. According to others, telephone communication by solid back transmitters. According to the testimony of other witnesses, telephone communication by toll lines running between towns and cities at a considerable distance from each other. According to the testimony of still other witnesses, telephone communication by telephone having a common battery system as distinguished from a local battery system. In my opinion, a fair conclusion from all the evidence in the case as to the meaning of the words "long distance telephone," as used in ordinance 180, is this: a telephone suitable and efficient for long distance use, and capable of being connected with and used in connection with wires running to distant points; and the mean-

115 ing of said section is, that the telephone company was granted a franchise to furnish facilities of such character as to transmitters, receivers, poles, wires, switching devices and other necessary appliances, that the patrons of the company in the City of Mitchell could at their own homes or places of business communicate with others, whether in the city, near the city, or at a distance from the city. This construction, in my opinion, gives force and effect to all of the words of the grant, and does violence to none of the language therein contained.

The ordinance further, in Section 5, contains the following lan-

guage: "In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central lines for fire alarm purposes." In reference to a very similar clause contained in an ordinance, the Circuit Court of Appeals in the case of City of Vermillion v. National Exchange Telephone Co., supra, uses the following language:

"The resolution further provides "that the city of Vermillion may have the free use, if desired, of their poles for fire alarm and police wires." This language clearly indicates that a local exchange was to be established. The use of the poles of a through line would have been of no advantage for the purpose of fire and police wires."

116 If we go outside of the language of the ordinance, and consider the circumstances leading up to and surrounding its passage, we are led to the same conclusion. At the time of the passage of the ordinance in 1904 a considerable percentage of the telephones in use in the City of Mitchell were equipped with an old style or type of transmitter, not capable of efficient service in long distance telephone work. Long distance facilities had become of great and growing importance. The telephone company in question was operating both long distance lines and local exchange lines in other parts of the State. Ordinance 174 had been passed in March 1904, but had been disapproved by the Telephone Company, as unsatisfactory. A new ordinance, No. 180, was prepared and submitted for passage. Ordinance 180 was largely in the same terms as ordinance 174, but there were several noticeable changes. In the title of Ordinance 180 occur the words "for the purpose of operating long distance telephone lines within and through the City of Mitchell." In the title of Ordinance 180 the above wording is changed so that it reads "for the purpose of operating a long distance telephone system within and through the City of Mitchell." Further, the word "in" was inserted between the word "residing" and the word "near", where the words occur towards the end of section one; so that while ordinance 174 read "with parties residing near or at a distance from Mitchell", ordinance 180 reads "with parties residing in, near or at a distance from Mitchell." These changes in the wording of the title and of this most important section of the ordinance are significant. The changes were made openly and advisedly. It cannot be believed that the changes were made without being discussed and fully understood by both parties interested.

Counsel for the defendant suggests that it is improbable that the city council would pass an ordinance providing for a second local exchange when one was already in existence. To this it may be answered that section 5 of ordinance 125 provides, "That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns," thus recognizing the possibility at least of more than one local exchange. Further, the local exchange then existing in the city at the time of the passage of ordinance 180 was not of the proper efficiency to form a part of a successful long distance system. The purchase of the local telephone system by the Dakota Central Telephone Lines had not been completed, at the time

of the passage of ordinance 174 and 180. As events shaped themselves, however, the Dakota Central Telephone Lines, instead of erecting and maintaining new local telephone facilities, purchased and improved the existing ones.

Counsel for the city further suggests that it is improbable that the city would have passed an ordinance which might result in taking away from the city the tax created under ordinance 135. Here again it can be but of slight value to speculate as to the motives of the city in passing ordinance 180. It may be observed, however, that there is no showing in the evidence in this case of any considerable amount of taxes received by the city under ordinance 135 prior to the passage of ordinance 180; nor is there any evidence that there was any assured or substantial basis for concluding that the revenue accruing under ordinance 135 from a purely local telephone system disassociated from a long distance telephone system would ever be of any considerable amount.

Counsel for defendant contends that the telephone company by paying taxes under ordinance 135 subsequent to the passage of ordinance 180, has placed a practical construction upon ordinance 180 as not granting a franchise to operate a local telephone exchange. While this suggestion is not without weight, it is by no means conclusive. It is not necessary to speculate upon the reasons why the telephone company continued to operate and pay taxes under ordinance 135 after the passage of ordinance 180. There may have been many and sufficient reasons. It is apparent upon the face of the two ordinances that greater *privileges* are granted under ordinance 135 than under ordinance 180. This of itself may have been sufficient.

Finally, counsel for the city suggests that the negotiations entered into between the telephone company and the city in 1903 looking towards the passage of a new ordinance, tend strongly to show that the telephone company did not at that time claim any right under ordinance 180 to maintain a local telephone exchange.

Such negotiations can have but little weight in determining the questions in controversy here. The proposed new ordinance was not introduced in evidence, and its terms are not disclosed. It might very well be that the telephone company was willing to negotiate for a new ordinance looking to the enjoyment of still greater rights and privileges than those which it already had under ordinance 180, and to continue perhaps for a longer time.

The conclusion therefore is that ordinance 180 did, as an integral part of the long distance telephone system franchise therein granted, also the privilege or franchise to maintain and operate a local telephone exchange, the subscribers of the telephone company using the same local transmitter in sending their long distance messages as in sending their local messages.

The resolution passed by the city in March, 1903, must next be considered. It is claimed on the part of the defendant that these resolutions were not strictly speaking ordinances of the city, and therefore, not equivalent to a State law, within the meaning of those words as used in Section 19, Article I, of the United States Constitu-

tion. It is to be observed, however, that the resolution of March 17th, 1913, while designated as resolution, has all the attributes of an ordinance. It is alleged in the complaint and admitted in the answer that "the City of Mitchell did on the 17th day of March, 1913, by its city council in regular session assembled, pass, adopt 120 and publish said resolution", and further, "that the mayor of the city approved the same." The mere fact that this action by the city council was designated as a resolution instead of an ordinance, is not controlling. It is sufficient that the action was authorized duly taken, and of a character legislative as distinguished from merely administrative, or as a mere declaration of intention. The language of the resolution is clear and unambiguous, and reads: "Resolved by the city council of the City of Mitchell in special session assembled, duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913";

"Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913"; and

"Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and 121 description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota."

It is admitted in the answer of the defendant city that the purpose of the city in passing said resolution was "to exclude said local exchange (that of complainant) from said city from and after said date;" and in paragraph 15 of the answer it is admitted that "unless the complainant shall comply with the provisions of said resolution the defendant will take such steps as shall be necessary to remove said poles and wires, fixtures and apparatus from the streets."

The defendant contends that the effect of these resolutions was primarily a declaration of intention on the part of the city, and at most, simply the repudiation of a contract between it and the complainant, and in support of that view it cites and relies upon the cases of St. Paul Gas Light Co. v. St. Paul, 181 U. S., 142; Dawson v. Columbia Trust Co., 197 U. S., 178; and Des Moines v. City Ry. Co., 214 U. S., 179. On the other hand, the complainant claims that the resolution in question comes within the decisions in the cases of Vicksburg v. Vicksburg Water Works, 202 U. S., 453; S. C. 185 U. S., 65; N. P. Ry. Co. v. Duluth, 208 U. S. 583; Iron Mountain Ry. Co. v. City of Memphis, 96 Fed. 113; A. T. & S. F. Ry. Co. v. Shawnee, 183 Fed. 85. In the last case cited the Court in its opinion, speaking of a resolution passed by the city council of the city of

Shawnee, which was less drastic in its terms than the resolution in the case at bar, said:

122 "We think that this resolution is quite different from that in the Des Moines case, and that it is substantially like that held in Northern Pacific Railway Co. v. Duluth, 208 U. S., 583, 28 Sup. Ct., 341, 52 L. Ed., 630, to impair the obligation of a prior contract. It is more than a mere declaration of the attitude of the city and a direction to its law officer to bring suit in court. It not only denies the company has any right or title to the street arising from a lawful vacation, but demands that it shall assume the burden of opening it up and restoring it to public travel. The resolution is militant, not merely declaratory."

This language is applicable to the resolution of March, 1913. In my judgment, this resolution of March, 1913, was, so far as this case is concerned, equivalent to an ordinance. It was duly passed by the city council and had the force and effect of a legislative act. It was passed by the municipality as such under its authority from the legislature, and was a State law within the meaning of that term as used in Section 10, Art. I, of the Constitution of the United States.

If Ordinance 180 granted to the telephone company the right to maintain and operate a local telephone exchange in connection with its long distance system, and if the resolution of March, 1913, has the effect of an ordinance and is a legislative act, as distinguished from a mere declaration of intention, then it is clear that the resolution in question impairs the obligation of a contract between 123 the complainant and the defendant, and deprives the complainant of its property without due process of law.

It is not necessary to enlarge upon this conclusion, as I do not understand that counsel for defendant question it, if the construction above placed upon ordinance No. 180 and upon the resolution of March, 1913, be correct.

The result is that the complainant is entitled to a permanent injunction as prayed for in its bill of complaint, enjoining and restraining the City of Mitchell, its officers, agents and servants from in any manner other than by exercise of lawful police power, interfering with, impairing or damaging the poles, telephone lines, and telephone exchange of complainant, owned, maintained and operated by it, upon the streets, alleys and public highways in said city as specified in Ordinance 180.

Formal decree may be prepared and submitted by counsel for complainant.

WILBUR F. BOOTH.

(Endorsed:) In Equity No. 5, Southern Division—Dakota Central Telephone Co. vs. City of Mitchell—Opinion of the Court—Filed July 14, 1915, Oliver S. Pendar, Clerk.

And afterwards, to-wit, on the 1st day of May, A. D. 1916, there was filed in the office of the clerk of said Court, Order extending time for settling Statement of Evidence; which said Order is in words and figures the following, to-wit:

124 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Order.

This action having come before the Court by agreement of the parties, and pursuant to notice given by the defendant, at the Court room of said Court in the City of Minneapolis, Minnesota, on the 15th day of April, A. D. 1916, upon the application of the defendant for the approval of the defendant's proposed statement of the evidence lodged with the Clerk of said Court on the 1st day of April, A. D. 1916, and the plaintiff having objected to the adoption and approval of said statement of the evidence upon the ground that the appeal in said case had not — taken when said statement was lodged with the Clerk and copy thereof served on plaintiff's counsel, and the plaintiff's counsel having at the same time and place requested additional time in which to propose amendments to the defendant's said statement of the evidence, and the Court having this date allowed an appeal in said case to the Supreme Court of the United States, and signed a citation requiring plaintiff to be and appear in the Supreme Court of the United States, within sixty days from and after said 15th day of April, 1916, pursuant to said appeal, to show cause, if any there be, why the decree rendered against defendant and appellant should not be corrected and why justice should not be done to the parties
125 in that behalf; both parties having by their respective counsel *agreeing* thereto in open court, and good cause appearing therefor, it is ordered that plaintiff have until the 6th day of May, 1916, within which to propose amendments to the defendant's said statement of the evidence in said case, and the hearing upon the notice of the defendant on said application to have its said statement of the evidence approved by the Court and certified as a true, complete and properly prepared statement of the evidence in said case, is hereby continued and adjourned until the 6th day of May, 1916, at ten o'clock A. M., at the chambers of the Judge of the United States District Court at the Federal Building in the City of Minneapolis, Minnesota.

Dated April 15, 1916.

By the Court:

WILBUR F. BOOTH, *Judge.*

Attest:

[Seal of Court.]

OLIVER S. PENDAR, *Clerk.*

(Endorsed:) 5 S. D. Equity—United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, Defendant—Order—Gamble, Wagner & Danforth, Attorneys for Defendant, Sioux Falls, South Dakota—Filed May 1st, 1916, Oliver S. Pendar, Clerk.

126 And afterwards, to-wit, on the 8th day of May, A. D. 1916, there was filed in the office of the clerk of said court, Statement of Evidence; which said Statement of Evidence, together with Affidavit of Service and Notice attached thereto, is in words and figures the following, to-wit:

127 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Affidavit of Service.

STATE OF SOUTH DAKOTA,
County of Davison:

Lauritz Miller, being first duly sworn on oath, deposes and says that he is one of the attorneys and solicitors for the above named defendant, and that on the 4th day of April, 1916, he served true copies of the annexed notice and statement of evidence upon the attorneys and solicitors for the complainant by personally delivering to and leaving with Dick Haney, a member of the firm of Spangler & Haney, at the office of said Spangler & Haney, in the City of Mitchell, State of South Dakota, true copies of said annexed notice and statement of the evidence.

LAURITZ MILLER.

Subscribed and sworn to before me this 4th day of April, 1916.
[NOTARIAL SEAL.]

LEWIS SHUSTER,
Notary Public.

(Endorsed:) United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company vs. The City of Mitchell—Affidavit of Service—Filed April 10, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

- 128 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Complainant,
vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Notice.

To the Complainant and Messrs. Thomas H. Null, Spangler & Haney, Attorneys and Solicitors for Complainant:

You will please take notice, that on the 1st day of April, A. D. 1916, the defendant will lodge in the office of the Clerk of said Court at Sioux Falls, South Dakota, a condensed statement of the evidence in said cause, a true copy of which is herewith served upon you.

You are further notified that on the 15th day of April, A. D. 1916, at ten o'clock A. M., or as soon thereafter as counsel can be heard, the defendant will ask the Court at the Chambers of the Hon. Wilbur F. Booth, the Judge who presided at the trial of said case, at the building in which the United States District Court is held, commonly known as the Federal Building and Postoffice in the City of Minneapolis, Minnesota, to approve said statement and to certify the same as a true, complete and properly prepared statement of evidence in said case, material to the questions to be presented to the Supreme Court of the United States on appeal thereto, upon the assignment of errors filed by the defendant herein in support of said appeal.

Dated this 31st day of March, A. D. 1916.

LAURITZ MILLER,
EDWARD E. WAGNER,
Attorneys and Solicitors for Defendant.

- 129 (Endorsed:) United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company vs. The City of Mitchell—Notice—Filed April 4, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

- 130 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Complainant,
vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Statement of Evidence.

At the trial of the above entitled action the following proceedings were had.

It was stipulated that the following should be taken and considered as facts upon the trial of this action:

I.

That the complainant, the Dakota Central Telephone Company, now is and ever since the 30th day of August, 1904, has been a corporation organized under the laws of the State of South Dakota, and by its charter is empowered and authorized to purchase, lease, construct and operate telephone lines and exchanges in the State of South Dakota, and that since the organization of said corporation the said complainant has acquired certain lines of telephone and telephone exchanges, and has been engaged as a common carrier in rendering telephone service and transmitting telephone messages and communications for the general public in and between cities, towns, villages and districts in which said complainant has telephone lines and exchanges.

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II.

That the defendant, the City of Mitchell, is and at all times mentioned in the complaint has been a municipal corporation situated in the County of Davison, State of South Dakota.

III.

That heretofore and on or about the 11th day of May, 1898, the City Council of the City of Mitchell adopted and passed and the Mayor of said City approved an ordinance, in words and figures as follows, which ordinance was designated as Ordinance No. 135:

"An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the use of the Streets, Alleys, and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said city, the said F. B. Elce, his associates, heirs and assigns are hereby granted the right to the use of the streets, alleys and public grounds of the said City of Mitchell, S. D., for the erection and maintenance of a public telephone system for the term of fifteen years from the date of the adoption or approval of this ordinance.

Section 2. That for such purposes the said F. B. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said City of Mitchell and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system.

132 Provided, That such poles, wires, and appliances shall not be so placed as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines or poles, wires, and other appliances, shall be located as far as possible in the alleys of said city. Provided further, that in no case shall the poles, wires and other appliances be placed on Main Street, except for the purpose of crossing said Main Street upon the streets running east and west. It is also provided that the said city council shall have the right to direct the location of all poles and lines or wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the City Council of the said City of Mitchell.

Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval of this ordinance, have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs and assigns, shall provide a suitable and convenient place for a central office, and shall maintain such office in operation during the business hours of each week day during the year, and at such other times as the business may demand; and the maximum rent for the said paying telephones established under this ordinance shall not exceed two dollars per month for business houses and one dollar and twenty-

five cents per month for residence houses, for service within
133 the city limits of the City of Mitchell; Provided, that if the
said F. B. Elce, his associates, heirs and assigns shall fail or neglect to have at least twenty telephones in successful operation at the expiration of six months from the adoption and approval of this ordinance then this ordinance shall be null and void, and all rights and privileges granted thereunder revoked.

Section 4. That in consideration of the said City of Mitchell granting to the said F. B. Elce, his associates, heirs, and assigns, the right and privilege to use the streets, alleys and public grounds of the said City of Mitchell, for the erection and maintenance of a public telephone system, and said F. B. Elce, his associates, heirs and assigns shall erect and maintain three telephones at such places as the City Council shall direct, and that the said three telephones shall be furnished to the said City during the term of fifteen years without cost or expense to the City of Mitchell; Provided, also, that at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of Two Thousand Four Hundred Dollars (\$2,400), the said F. B. Elce, his associates, heirs and assigns, shall pay to the City of Mitchell, ten per cent of the amount in excess of Two Thousand Four Hundred Dollars (\$2,400) received as gross receipts from the said telephone system, which said sum shall be paid to the City at the end of each and every year, and the City Council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

134 Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section 6. That if the said F. B. Elce, his associates, heirs and assigns shall fail to comply with any of the provisions of this ordinance then the City Council of the City of Mitchell, shall have the power to declare the privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intention shall be given by the said City Council to the said F. B. Elce, his associates, heirs and assigns, and a reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and approved May 11, 1898.

THOMAS FULLERTON, *Mayor.*

Attest:

J. K. SMITH,
City Auditor."

This said ordinance was duly published and the said F. B. Elce, the grantee in said ordinance, No. 135, duly accepted the terms and conditions of said ordinance, and that under and in pursuance thereof the said grantee therein, F. B. Elce, installed a local telephone system in the said City of Mitchell, South Dakota, and used and occupied the streets, alleys, public grounds and highways of said City with the poles, wires and fixtures used in the operation of said telephone system.

That the said F. B. Elce, within six months after the passage and approval and publication of said ordinance No. 135 did have not less than twenty telephones installed and in successful operation in said

135 City, as provided by said ordinance, and that said F. B. Elce conducted, owned and operated said local telephone in said City of Mitchell, until on or about the 25th day of May, 1904, at which time said Elce entered into the following contract for the sale of said local telephone exchange to the Dakota Central Telephone Lines, which contract — in words and figures as follows, to-wit:

"This agreement made this 25th day of May, 1904, by and between F. B. Elce, of Mitchell, S. D., party of the first part, and the Dakota Central Telephone Lines, a corporation, party of the second part; witnesseth:

The party of the first part hereby agrees to convey to party of the second part by sufficient bill of sale all the property now known as the Mitchell Telephone Exchange, switchboard- and appliances of every nature, now used in the exchange known as the Mitchell Telephone Exchange, and also to convey by warranty deed the building as well as the lots on which the buildings is located, containing the said Telephone Exchange; also the lots adjoining, a description of which is as follows:

Lots Five (5) and six (6) in Block Eleven (11) in M. H. Rowley's Addition to Mitchell.

In consideration whereof the party of the second part agrees to pay to the party of the first part the sum of \$18,000.00; the same to be paid in installments as follows:

\$100.00 on May 25th, 1904, the receipt whereof is hereby acknowledged.

\$4900.00 on June 6th, 1904;

\$6500.00 on June 15th, 1904;

\$6500.00 on July 1st, 1904.

136 The party of the first part covenants and agrees with the party of the second part that the aforesaid property is free from incumbrances of whatsoever nature.

It is further agreed by the parties hereto, that the party of the first part is to have possession of the property until June 1st, 1904, and is entitled to all the earnings and revenues therefrom up to that date, but all the earnings and revenues accruing after June 1st, 1904 are to inure to the party of the second part.

The party of the first part is to manage the business until the date of delivery, June 1st, 1904.

T. B. ELCE.

DAKOTA CENTRAL TELEPHONE LINES.

J. L. W. ZEITLOW, *Pres.*

E. ZEITLOW.

W. G. BICKELHAUPT.

That the consideration for the sale of said telephone exchange by Elce to said Dakota Telephone Lines was paid as follows:

May 25, 1904.....	\$100.00
June 3, 1904.....	4900.00
June 18, "	6500.00
July 6, "	6500.00

That on the 3rd day of June, 1904, a deed and bill of sale for the conveyance of said property were executed and deposited in the First National Bank of Mitchell in escrow for delivery to said Dakota Central Telephone Lines on payment of said sums; that

137 on the final payment thereof, July 6, 1904, said deed and bill of sale were delivered and said sale was consummated in accordance with the terms of said contract.

IV.

That at and prior to the 1st day of June, 1904, the Dakota Central Telephone Lines, named and mentioned in paragraph four of complainant's bill of complaint, was and has been a corporation duly organized and doing business under the laws of the State of South Dakota; and that on or about the 21st day of March 1904, the City Council of the said City of Mitchell, South Dakota, adopted and passed and the Mayor of said City approved an ordinance, in words and figures as follows:

Ordinance No. 174.

An Ordinance to Grant Permission to the Dakota Central Telephone Lines, (Inc.) their Successors or Assigns, the Right to Erect Poles and Fixtures, and to String Wires, for the Purpose of Operating Long Distance Telephone Lines, Within and Through the City of Mitchell, South Dakota.

Be it ordained by the Council of the City of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privileges, given to the Dakota Central Telephone Lines, (Inc.) their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main Street, Park Avenue, Fourth Street and Fifth Street, and maintain the same for a period of twenty years,

138 from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of the street commissioner, or a committee appointed by the City Council.

3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways, or shade or ornamental trees, in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the city of Mitchell, S. D., shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

139 Section 6. This ordinance shall be in effect, from and after the date of its passage and approval.

Passed March 21st, 1904.

Approved.

J. L. HANNETT, *Act. Mayor.*
J. G. MARKHAM, *'Auditor.'*

That said ordinance was duly published according to law, and that thereafter and on or about the 7th day of June, 1904, the

City Council of the City of Mitchell adopted and passed and the Mayor of said City approved an ordinance, in words and figures as follows:

Ordinance No. 180.

An Ordinance to Grant Permission to the Dakota Central Telephone Lines, (Inc.), their Successors or Assigns, the Right to Erect Poles and Fixtures and to String Wires, for the Purpose of Operating a Long Distance Telephone System, Within and Through the City of Mitchell, South Dakota.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

Section 1. That there is hereby granted the right and privilege given to the Dakota Central Telephone Lines, (Inc.) their successors or assigns to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and

Fifth Streets, at right angles, where it is necessary, and main
tain the same for a period of twenty years from and after the
passage and approval of this ordinance, for supplying the
citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said city of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

141 Section 6. This ordinance shall be in effect, from and after the date of its passage and approval. Passed June 6th
1904.

Approved June 7th, 1904.

GEO. A. SILSBY, *Mayor.*
J. G. MARKHAM, *Auditor.*

And that said ordinance was duly published according to law.

V.

That some years prior to the passage of said ordinances Nos. 174 and 180 the Dakota Southern Telephone Company, a partnership doing business in the State of South Dakota, had constructed long distance telephone lines into the City of Mitchell, South Dakota, but that the records of said City do not show that any ordinance or resolution was ever passed or adopted by the City Council of said City, and such records do not show that any other act was done consenting to or by which said City consented in any manner to the construction, use or operation of such long distance telephone lines into or through said City, or that said City ever in any way ratified or approved of any such construction, use or operation of such lines; that some time in 1903 the Dakota Central Telephone Lines purchased said long distance lines of the Dakota Southern Telephone Company, and on or about the 2nd day of October, 1904, said Dakota Central Telephone Lines sold said long distance lines into the City of Mitchell to complainant herein, and that complainant has owned and operated the same, together with new ones constructed

by it, at all times since, and that plaintiff has never secured
142 any consent or permission from the municipal authorities of

said City of Mitchell to own, construct or operate any long distance telephone lines within the corporate limits of said city except as it may have consented thereto by the enactment and approval of said Ordinances Nos. 174 and 180.

VI.

That on or about the 25th day of May, 1904, the said Dakota Central Telephone Lines Purchased from said F. B. Elce, the grantee named in said Ordinance No. 135, the local telephone exchange, constructed, owned and operated by said F. B. Elce, under and by virtue of said Ordinance No. 135, together with all the rights and privileges of said F. B. Elce under said ordinance; that said purchase was consummated on or about the 6th day of July, 1904, as hereinbefore recited in paragraph three, and that said Dakota Central Telephone Lines owned and operated the said local telephone exchange in said City of Mitchell until on or about the 2nd day of October, 1904; that on or about the said 2nd day of October, 1904, the said Dakota Central Telephone Lines sold, assigned and transferred to complainant said local telephone exchange together with all its rights, franchises and privileges to own, operate and conduct said local telephone exchange.

VII.

That on or about the 10th day of April, 1907, the City Council of said City of Mitchell duly passed and the Mayor of said City approved a resolution, in words and figures as follows:

143 "Be it resolved, by the City Council of the City of Mitchell,
South Dakota, that the right is hereby granted to the Dakota

Central Telephone Company, their successors or assigns, to place, construct, and maintain through and under the streets, alleys and public grounds of said City all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

VIII.

That without the request or consent of the defendant, the City of Mitchell, the complainant herein, during the latter part of the year 1912 and the first part of the year 1913, installed an automatic telephone system in the said City of Mitchell, South Dakota, and that prior thereto the said complainant constructed a fireproof telephone exchange building, and which building the said complainant now is and ever since its construction has been using as a telephone exchange building in said City.

IX.

That on or about the 17th day of March, 1913, the defendant, the City of Mitchell, by its City Council in regular session assembled, passed, adopted and published the following resolutions:

Telephone Resolution.

Whereas the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Eles, His Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. Dak., for the erection and maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas, the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305 of the City of Mitchell, S. Dak., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local system or exchange in the City of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and

Whereas, the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota; and,

Now Therefore, Be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right

and privilege of the Dakota Central Telephone Company,
 145 to construct, operate and maintain a local telephone system
 or exchange in the City of Mitchell, South Dakota, so and
 the same are hereby terminated from and after the 15th day of May,
 1913; and

Be it further resolved that said Dakota Central Telephone Com-
 pany shall have no right or privilege to construct, operate or main-
 tain a local telephone system or exchange in the City of Mitchell,
 South Dakota, from and after the 15th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Com-
 pany be, and it is hereby notified and requested forthwith on the
 15th day of May, 1913, to remove from the streets, avenues, alleys
 and public grounds of the City of Mitchell, South Dakota, all of its
 poles, wires, cables, fixtures and apparatus of every kind and descrip-
 tion used by it in the construction, maintenance and operation of its
 local telephone exchange or system in the City of Mitchell, South
 Dakota; and

Be it further resolved that the said Dakota Central Telephone Com-
 pany be, and it is hereby notified and required that in case said
 company fails, neglects or refuses to comply with the provisions of
 this resolution and to remove from the streets, avenues, alleys and
 public grounds of the City of Mitchell, South Dakota, all of its
 poles, wires, cables, fixtures and apparatus of every kind and descrip-
 tion used by it in the construction, maintenance and operation of its
 local telephone exchange or system in the City of Mitchell, South
 Dakota, as herein required, then the City Council of the City
 of Mitchell, South Dakota, will take such steps as may be
 146 necessary to cause the immediate removal of said poles,
 wires, cables, fixtures and apparatus from the streets, avenues,
 alleys and public grounds of the City of Mitchell, South Dakota;
 and

Be it further resolved that a copy of this resolution be served upon
 said Dakota Central Telephone Company, by mailing a copy of
 same by registered mail, to J. L. W. Latimer, the President of said
 Company at Aberdeen, South Dakota, and that the City Auditor of
 the City of Mitchell, South Dakota, is hereby directed to forthwith
 mail a copy of this resolution by registered mail to said J. L. W.
 Latimer in accordance herewith; and,

Be it further resolved that the mailing of a copy of this resolu-
 tion by the City Auditor to the president of said company as herein
 required, and the mailing of such copy by said president shall consti-
 tute notice to said Dakota Central Telephone Company of the
 contents of this resolution and of the intention of the City Council
 of the City of Mitchell, South Dakota, relative to the matter
 herein contained.

Adopted and approved the 15th day of March, 1913.

A. H. BREWER, Mayor.

Attest,

N. H. JENSEN,
City Auditor.

That at the same meeting said City Council adopted, and the Mayor approved two other resolutions as follows:

Telephone Resolution.

Whereas, the right of the Dakota Central Telephone Company to construct, maintain, and operate a local telephone exchange or system in the City of Mitchell, South Dakota, will cease and terminate on the 11th day of May, 1913; and,

147 Whereas, the City Council of the City of Mitchell, South Dakota, and the said Dakota Central Telephone Company have failed to agree upon the terms and conditions upon which the said company might continue to operate and maintain a local telephone exchange or system in the City of Mitchell, South Dakota, from and after the said 11th day of May, 1913; and

Whereas, the City Council of said city is desirous of protecting its rights in said matter.

Now Therefore, to protect its said rights and to avoid waiving said rights,

Be it Resolved by the City council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called this 17th day of March, 1913, that all the officers and employes of the said City of Mitchell, South Dakota, be and they are hereby directed and requested not to contract, either directly or indirectly with the Dakota Central Telephone Company, for any local telephone service from said company in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913, until the controversy now existing between said city and the company have been adjusted, and they are further directed and requested to terminate, on the said 11th day of May, 1913, all relation existing on that date, between them and the Dakota Central Telephone Company relative to local telephone service furnished by said Dakota Central Telephone Company, in said City of Mitchell, South Dakota.

Adopted and approved the 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor.

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Fire Alarm Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota, ceases and terminates on the 11th day of May, 1913; and,

Whereas, the said Dakota Central Telephone Company has heretofore furnished the City of Mitchell, South Dakota, all necessary fire alarm service.

Now therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, that the City of Mitchell, South Dakota, purchase

d install a fire alarm system for said City of Mitchell, South Dakota, to be used from and after the 11th day of May, 1913; and Be it further resolved that the city engineer of the City of Mitchell, South Dakota, be and he is hereby authorized and directed to prepare plans and specifications for a complete and adequate fire alarm system for the City of Mitchell, South Dakota, and to report said plans and specifications as soon as completed, to the City Council of the City of Mitchell, South Dakota.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor.

9 And that immediately after the passage of said resolution the said City Council caused a copy of the first of said resolutions above set out to be served upon the complainant herein.

X.

That the Dakota Central Telephone Lines and the complainant herein, from the time of the purchase of said local telephone exchange in the City of Mitchell, South Dakota, from F. B. Elee, as hereinbefore set out, and up to the 11th day of May, 1913, has complied with the provisions of Section 3 of said Ordinance No. 135, which provided that the maximum rent for said telephone established under said ordinance should not exceed Two Dollars per month for each business telephone and One and 25/100 Dollars (\$1.25) per month for each residence telephone.

That on or about the 13th day of March, 1913, the said complainant filed the following petition with the Board of Railroad Commissioners of the State of South Dakota for the purpose of securing permission to increase the rental rates of said local telephone exchange in the City of Mitchell, South Dakota, to-wit:

"ABERDEEN, S. D., M'ch 17, 1913.

the Honorable Board of Railroad Commissioners of the State of South Dakota, Pierre, S. D.

GENTLEMEN: In accordance with Sec. 10 of Chap. 207, of the 11 Session Laws, we hereby file the following rates: the same to come effective May 12th, 1913, and applying at Mitchell, S. D.:

Long Distance Automatic Telephone Rentals.

in Line Business rate	\$3.25	per Mo.
in Line Residence rate.....	2.25	" "
in Party Residence rate.....	1.75	" "
ring & Talking Extensions.....	1.00	" "
king Extensions50	" "

Private Branch Exchange:

For each Main Line Trunk.....	3.00	"	"
For each Station connected to the Private Branch Exchange50	"	"

A discount of 25¢ per month to be made on all rentals paid at our office in the City of Mitchell, on or before the 10th of the month for the current month's rental, except Extension Telephones and Private Branch Exchanges, which will be net.

Yours truly,

DAKOTA CENTRAL TELEPHONE CO.,
By W. G. BICKELHAUPT, *Sec'y.*

That in opposition to said petition and prior to the hearing thereon, the defendant, the City of Mitchell, made a special appearance before said Board of Railroad Commissioners of the State of South Dakota, and objected to the jurisdiction of said Board on said matter; that said special appearance was made in writing and filed with the said Board and was in words and figures as follows, omitting formal parts, to-wit:

151 "Comes now the undersigned and appeared specially for and in behalf of the City of Mitchell, South Dakota, in the above entitled matter, for the purpose of objecting to the jurisdiction of the Board of Railroad Commissioners of the State of South Dakota, in said matter and for no other purpose.

The objection to the Jurisdiction of said Board in said matter is based upon the following grounds, to-wit:

1st. That the applicant, the Dakota Central Telephone Company has no franchise to maintain and operate a local telephone exchange within the corporate limits of the City of Mitchell, South Dakota, and that their franchise to so maintain and operate a local telephone exchange in said City of Mitchell, expired by express limitation in said franchise on the 11th day of May, 1913, and the same has not been renewed or extended and no new franchise has been granted to said company by the municipal authorities of said City of Mitchell, South Dakota.

2nd. That under and by virtue of the provisions of Article X, Section 3 of the South Dakota constitution, the City of Mitchell, South Dakota, has the exclusive right to determine exchanges within the corporate limits of said city, and under what terms and conditions the same shall be done, and the Board of Railroad Commissioners of the State of South Dakota has no power or authority to deprive the City of said right.

3rd. That the City of Mitchell, South Dakota, has ordered the said Dakota Central Telephone Company to remove from the streets, alleys and other public grounds, all of its wires, poles, and fixtures used in the operation of its said local telephone exchange, in said

152 city, but that said company, in defiance of the said City's rights herein has refused and still refuses to comply with said orders, and said company is now operating its said local tele-

exchange in said City without the City's consent, and in
the wishes of said City and its inhabitants.

That the Dakota Central Telephone Company is now a trespasser in the City of Mitchell, South Dakota, and the law should not afford any relief to trespassers.

That the Dakota Central Telephone Company is asking this Board to establish a schedule of long distance automatic telephone in the City of Mitchell, South Dakota, when in truth and in fact the telephone exchange operated and maintained in the City of Mitchell, South Dakota, by the Dakota Central Telephone Company is a local exchange and not a long distance exchange, and in order to show that the said applicant's petition this board would be required to show that the telephone exchange which enables a resident of said city to talk over the telephone to his next door neighbor is a long distance telephone exchange. And this Board has no Jurisdiction to make such findings."

It during said time and up to the 11th day of May, 1913, the complainant herein complied with Section 3 of the Ordinance No. 135, whereby the said F. B. Elce, his associates, heirs and assigns were required to provide a suitable and convenient place for a central office and to maintain such office in operation during the business hours of each week during the year and at such other times as the business might demand, and that said complainant, during said time and up to the 11th day of May, 1913, erected, maintained and operated three telephones for the said City of Mitchell, South Dakota, at such place as the City Council of said City directed without cost and expense to the said City, as required by Section Four of said Ordinance No. 135.

It for the purpose of computing the gross receipts of said local telephone exchange, as provided for in Section four of said Ordinance No. 135, the defendant herein, and F. B. Elce, the grantee therein, and the complainant deemed the year to commence on the 1st day of April of each year, and that for the year ending May 31, 1905, the gross receipts of said local telephone exchange exceeded the sum of \$2400.00, and that ten per cent of the said gross receipts in excess of \$2400.00 for the said year amounted to the sum of \$300.00 and that the complainant herein voluntarily and without objection paid to the City of Mitchell the said \$300.00 as required by Section four of Ordinance No. 135.

It the gross receipts of the said local telephone exchange for the year ending May 31, 1906, exceeded the sum of \$2400.00, and that ten per cent of the said gross receipts in excess of \$2400.00 amounted to the sum of Four Hundred Twelve and 30/100 Dollars (\$412.30), and that the complainant herein voluntarily and without objection paid said \$412.30 as required by Section four of Ordinance No. 135.

It the gross receipts of said local telephone exchange for the year ending May 31, 1907, amounting to the sum of \$10,025.00, and for the year ending May 31, 1908, amounting to the sum of \$12,500.00, and that for the year ending May 31, 1909, the said gross

receipts amounted to the sum of \$13,253.30, and that for 154 the year ending May 31, 1910, the said gross receipts amounted to the sum of \$14,882.35.

That in the year 1908 the complainant herein refused to pay the said ten percent of the gross receipts in excess of \$2400.00 for the years ending May 31, 1907 and 1908, and that the defendant herein thereupon brought suit against the said complainant for the said portion of said gross receipts, and that in said suit the said defendant herein secured judgment against the complainant herein for the said portion of said gross receipts, and that thereafter, during the year 1911, the complainant herein paid to said defendant the amount of said judgment and in addition thereto the said complainant voluntarily and without objection paid to the said City of Mitchell, the defendant herein, ten percent of the gross receipts of said local telephone exchange in excess of \$2400.00 for the years ending May 31, 1909, and May 31, 1910. That the gross receipts of said local telephone exchange in the City of Mitchell for the years ending May 31, 1911, May 31, 1912 and up to May 11, 1913, has exceeded \$2400.00 each year, and that complainant herein has refused to pay ten per cent of said gross receipts in excess of \$2400.00, as required by Section four of Ordinance No. 135 from the said 31st day of May, 1910, to the 11th day of May, 1913, for the reason that complainant claims that it is relieved from the payment of said charge by the provisions of Chapter 84 of the Session Laws of 1911 of the State of South Dakota, and particularly by Section 6 of said Chapter.

That prior to June 1, 1904, F. B. Elce, the grantee named in Ordinance No. 135, owned and operated the said local telephone exchange in the said City of Mitchell under and in accordance with the provisions of Ordinance No. 135, and the Dakota Central Telephone Lines owned and operated long distance telephone lines running into said City of Mitchell, South Dakota, and that said local telephone exchange and toll lines were owned and operated as separate and distinct telephone lines or exchanges. That the complainant herein now owns and operates, and ever since the purchase of said local telephone exchange and toll telephone lines by the complainant, as hereinbefore set out, has owned and operated the said local telephone exchange in said City of Mitchell and also the said toll telephone system or lines in said city.

That the said local telephone exchange, so owned and operated by the complainant herein, is a separate and distinct telephone system or exchange from the said toll system or lines so owned and operated by the complainant in that the said local telephone exchange furnishes facilities to the residents of said City of Mitchell to communicate with each other by telephone at a flat rate per month, and that in case any of the patrons or subscribers of said local telephone exchange desires to use the said toll system or lines they must first

156 be connected up to said long distance lines each time they so desire to use such system, and they are charged a special rate or toll for each of such services, the amount of such charges depending upon the distance of the said toll message transmitted and the length of time in transmitting such message, and that the said toll lines or system is used exclusively in transmitting and receiving toll messages coming from outside the city from and to inhabitants within the said city, and that the wires or lines of said local exchange are used only for local telephone service within the corporate limits of the said City, except when the same are connected to said toll system for the purpose of receiving or transmitting a toll message to or from outside of said city.

That a number of subscribers or patrons of said local telephone exchange, the exact number of which is unknown, have never used and never use the said toll system or lines for the service furnished thereby, and that said subscribers and patrons use said local exchange exclusively, but the toll lines are open to all subscribers on equal terms.

That since the installation of said automatic telephone system, hereinbefore mentioned, any subscriber or patron of the said local telephone exchange can automatically call up and transmit messages to any other patron or subscriber of said exchange within the limits of said city without the intervention of the central office of said exchange, but that no patron or subscriber of said local exchange can automatically call up any person outside of said city and transmit to such person any toll message without the intervention of a central office and without first being connected up to said 57 long distance system by the long distance or toll operator at the central office of said long distance system.

XII.

That on or about the 22nd day of September, 1908, the defendant herein, the City of Mitchell, together with A. E. Hitchcock, as Mayor, Clarion D. Hardy, John McDougal, John Michaels, P. M. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle, and C. E. Reeves, members of the City Council of said City of Mitchell, instituted an action in the Circuit Court of Davison County, South Dakota, against the complainant herein for the recovery of ten percent of the gross earnings, charges as provided in Section four of Ordinance No. 135 or the years ending May 31, 1907 and May 31, 1908.

That said action was duly tried before the said Circuit Court of Davison County, South Dakota, and findings of fact, conclusions of law and judgment were duly rendered by said Circuit Court in favor of the complainant herein; and that thereafter and in due time the defendant herein duly appealed from said judgment and conclusions of law to the Supreme Court of the State of South Dakota; and that thereafter, on the 24th day of May, 1910, the said Supreme Court of the State of South Dakota, duly rendered its decision in said action reversing the said judgment of the Circuit Court and directing said Circuit Court to amend its conclusions of law and judgment to con-

form with the decision of said Supreme Court, and to enter judgment for the said City of Mitchell as prayed for in the complaint in said action; and that thereafter the said Circuit Court duly 158 made and filed its amended conclusions of law and judgment in conformity with the said directions of said Supreme Court, and that thereupon the complain-t herein duly appealed from said judgment to the Supreme Court of the State of South Dakota, and that thereafter the Supreme Court of the Sate of South Dakota, on June 20, 1911, rendered its decision affirming the said judgment of the Circuit Court of Davison County, South Dakota.

That a true copy of the complaint, answer, reply, findings of fact, conclusions of law, judgment and notice of appeal, as originally made by the said Circuit Court of Davison County, South Dakota, in said action, are as follows:

Complaint.

The plaintiffs for a cause of action complain and allege:

I. That plaintiff, the City of Mitchell, now is and at all times hereinafter mentioned has been a municipal corporation duly organized under the laws of the State of South Dakota, as one of the cities of said state.

H. That the plaintiff, A. E. Hitchcock, is the duly elected, qualified and acting Mayor of the City of Mitchell, South Dakota, and a member of the City Council of this city of Mitchell, and has been such since the fourth day of May, 1908, the plaintiffs, Clarion D. Hardy, John McDougal, John Michaels, P. H. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle, and E. C. Reeves are the duly elected, qualified and acting aldermen of the City of Mitchell and members of the city council of said city of Mitchell, and have been such from the fourth day of May, 1908.

159 III. That the defendant now is and at all times herein-after mentioned has been a corporation duly incorporated and existing under the laws of the State of South Dakota.

IV. That the plaintiff, the city of Mitchell, by and through its common council, on the 11th day of May, 1989, passed and adopted the following Ordinance, known as Ordinance No. 135, of the City of Mitchell, South Dakota:

Ordinance No. 135.

"An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns, the use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said City, the said F. B. Elce, his as-

sociates, heirs and assigns are hereby granted the right to the use of the streets, alleys and public grounds of the said City of Mitchell, S. D., for the erection and maintenance of a public telephone system for the term of fifteen years from the date of the adoption or approval of this ordinance.

Section 2. That for such purposes the said F. B. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said City of Mitchell and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system. Pro-

vided, that such poles, wires, and appliances shall not be
160 so placed as to in any way interfere with the rights of owners
of adjacent property, nor with the free passage of vehicles;
and that lines or poles, wires, and other appliances, shall be located
as far as possible in the alleys of said City. Provided further, that
in no case shall the poles, wires and other appliances be placed on
main street, except for the purpose of crossing said Main Street
upon the streets running east and west. It is also provided that
the said City Council shall have the right to direct the location of
all poles and lines or wires upon the said streets, and the erection
of all poles and lines or wires shall be under the direction and
subject to the approval of the City Council of the said City of
Mitchell.

Section 3. That the privileges herein granted are given under
the following conditions, to-wit: That the said F. B. Elce, his as-
sociates, heirs and assigns, shall, within six months after the pas-
sage and approval of this ordinance, have at least twenty telephones
in successful operation; that the said F. B. Elce, his associates,
heirs and assigns, shall provide a suitable and convenient place for a
central office, and shall maintain such office in operation during
the business hours of each week day during the year, and at such
other times as the business may demand; and the maximum rent
for the said paying telephones established under this ordinance
shall not exceed two dollars per month for business houses and
one dollar and twenty-five cents per month for residence houses,
for service within the city limits of the city of Mitchell; Provided,
that if the said F. B. Elce, his associates, heirs and assigns shall
fail or neglect to have at least twenty telephones in successful
161 operation at the expiration of six months from the adoption
and approval of this ordinance, then this ordinance shall
be null and void, and all rights and privileges granted thereunder
revoked.

Section 4. That in consideration of the said City of Mitchell
granting to the said F. B. Elce, his associates, heirs, and assigns,
the right and privilege to use the streets, alleys and public grounds
of the said City of Mitchell, for the erection and maintenance of a
public telephone system, the said F. B. Elce, his associates, heirs
and assigns shall erect and maintain three telephones at such places
as the City Council shall direct, and that the said three telephones
shall be furnished to the said City during the term of fifteen years
without cost or expense to the City of Mitchell; Provided, also that

at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of Two Thousand Four Hundred Dollars (\$2,400.00), the said F. B. Elce, his associates, heirs and assigns, shall pay to the City of Mitchell ten per cent of the amount in excess of Two Thousand Four Hundred Dollars (\$2,400.00) received as gross receipts from the said telephone system, which said sum shall be paid to the City at the end of each and every year, and the City Council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

162 Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section —. That if the said F. B. Elce, his associates, heirs and assigns shall fail to comply with any of the provisions of this ordinance then the City Council of the City of Mitchell, shall have the power to declare the privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intention shall be given by the said City Council to the said F. B. Elce, his associates, heirs and assigns, and a reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and approved May 11th, 1898.

THOMAS FULLERTON, *Mayor.*

Attest:

J. K. SMITH,
City Auditor."

That said ordinance received a majority vote of the members of said common council in regular meeting assembled, that said ordinance was duly approved by the Mayor of said city on the 11th day of May, 1898, and was duly published, as required by law and went into effect on or about the said 11th day of May, 1898, as one of the ordinances of said city, and is now in full force and effect.

That F. B. Elce, the grantees in said ordinance No. 135, duly accepted the terms and conditions of said ordinance, and that under and in pursuance thereof the said grantees therein, F. B. Elce, installed a local telephone system in said City of Mitchell, S. Dak., and used and occupied the streets, alleys and public grounds and highways of said city with the poles, wires and fixtures, used in the operation of said telephone system, under the restrictions, limitations and conditions of said Ordinance No. 135; that the said F. B. Elce, within six months after the passage and approval and publication of said Ordinance No. 135, did have not less than twenty telephones installed and in successful operation in said city as

provided by said ordinance, and that said F. B. Elce conducted and operated said local telephone system in said City of Mitchell, South Dakota, in accordance with and under the terms and conditions of said Ordinance No. 135, until on or about the 3rd day of June, 1904.

VI.

That on or about the 3rd day of June, 1904, the said F. B. Elce, for a valuable consideration, sold, conveyed, and assigned said local telephone *telephone* system together with all the poles, wires and fixtures used in connection therewith, and all the rights and privileges granted by said ordinance No. 135 to the grantee therein, his associates, heirs and assigns, to the Dakota Central Telephone Lines, a corporation duly incorporated and existing under the laws of the State of South Dakota, and by said conveyance the said Dakota Central Telephone Lines became bound by the duties, obligations and conditions of said Ordinance No. 135.

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VII.

That on or about the 2nd day of October, 1904, the defendant corporation through mesne conveyances from the said Dakota Central Telephone Lines, for a valuable consideration, became the purchaser and owner of said local telephone system in said City of Mitchell, together with all the poles, wires and fixtures used in connection therewith, and of the rights and privileges granted by said ordinance to the grantee therein, his associates, heirs and assigns; and that said defendant corporation by said conveyance and purchase became bound by the duties, obligations and conditions of said Ordinance No. 135; that ever since said 2nd day of October, 1904, the defendant corporation has owned, operated and conducted said telephone system in said City of Mitchell, South Dakota, under said Ordinance No. 135, and said defendant corporation is now owning, operating and conducting said telephone system under said Ordinance No. 135.

VIII.

That under and by virtue of the conditions and obligations in said Ordinance No. 135, and in consideration of the privileges and rights therein granted to the grantee, his associates, heirs and assigns, the defendant corporation became obligated to pay the said City of Mitchell, at the end of each and every year thereafter, the sum of ten percent. of the annual gross receipts in excess of the sum of \$2,400. received by the defendant from said local telephone system in said City of Mitchell, South Dakota.

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IX.

That the gross receipts from said local telephone system for the year ending May 31st, 1902, exceeded the sum of \$2,400.00; that up

to and including the year ending May 31, 1904, the said F. B. Elce, grantee in said Ordinance No. 135, paid to said City of Mitchell, the said ten per cent of the amount in excess of said sum of \$2,400.00 received by him as gross receipts from said telephone system, and that for the years ending May 31st, 1905 and May 31st, 1906, the defendant corporation voluntarily and without objection paid to said City of Mitchell, the said ten percent of the annual gross receipts in excess of said sum of \$2,400.00 received by said defendant from said telephone system for each of the said years respectively.

X.

That the gross receipts of the defendant corporation from said local telephone system in said City of Mitchell, for the year ending May 31, 1907, amounted to the sum of \$10,025.00; that ten per cent of said gross receipts in excess of said sum of \$2,400.00 for the said year ending May 31st, 1907, amounts to the sum of \$762.50; that no part of said sum has been paid by the defendant to the said City of Mitchell, although said sum became due and payable on the 1st day of June, 1907, and that there is now due and owing to the said City of Mitchell, from the defendant corporation, the said sum of \$762.50 for the said year ending May 31, 1907, under the provision of said Ordinance No. 135; that the plaintiff duly demanded payment of said sum from the defendant, but defendant

166 wholly refused to pay said sum and denies all liability therefor under said Ordinance No. 135.

XI.

That the gross receipts of the defendant corporation from the said local telephone system in the said City of Mitchell, for the year ending May 31st, 1908, amounted to the sum of \$12,092.75; that ten per cent of said gross receipts in excess of the said sum of \$2,400.00, for the said year ending May 31st, 1908, amounts to the sum of \$969.27; that no part of said sum has been paid by the defendant to the said City of Mitchell, although said sum became due and payable on the 1st day of June, 1908; that there is now due and owing to the said city of Mitchell, from the defendant corporation the sum of \$969.27 for the said year ending May 31st, 1908, under the provisions of said Ordinance No. 135; that the plaintiffs duly demanded payment of said sum from the defendant but defendant wholly refused to pay said sum and denies all liability therefor under said Ordinance No. 135.

Wherefore, plaintiffs demand judgment against the defendant for the sum of \$1,731.77 together with interest at the rate of seven per cent per annum on \$762.50 of said sum from the 1st day of June, 1907, and on \$929.27 of said sum from the 1st day of June, 1908, and for their costs and disbursements in this action.

LAURITZ MILLER,
Attorney for Plaintiffs.

167 To the foregoing complaint the following answer and counterclaim were interposed, omitting title, venue and verification:

Answer.

I. Now comes the defendant and for answer to plaintiffs' complaint denies the allegations contained in the eighth paragraph hereof.

Defendant further denies the allegation contained in the ninth paragraph of plaintiffs' complaint wherein it is alleged "That for the years ending May 31st, 1905, and May 31, 1906, the defendant corporation voluntarily and without objection paid to said City of Mitchell, the said ten per cent of the annual gross receipts in excess of said sum of \$2,400.00 received by said defendant from said telephone system for each of the said years respectively."

II. Defendant for further answer alleges that on or about June 7th, 1904, the City Council of the City of Mitchell passed an ordinance in words and figures as follows:

"Ordinance No. 180.

An ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the City of Mitchell, South Dakota.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

168 Section 1. That there is hereby granted the right and privilege, given to the Dakota Telephone Lines (Inc.), their successors or assigns to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets, at right angles, where it is necessary, and maintain the same for a period of twenty years from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the City Council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer or gutter in said City of Mitchell, and the city of Mitchell may adopt any reasonable rules and regulations of a police

nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

109 Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell, reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell, South Dakota, shall have the right to string wires on the poles of the Dakota Central Telephone Lines for the alarm purposes, and work to be superintended by the above company and such wires not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect, from and after the date of its passage and approval.

Passed June 6, 1904. Approved June 7, 1904.

J. C. MARKHAM, Justice

That said ordinance so passed and approved superseded the ordinance set out in plaintiff's complaint and thereafter the defendant operated and maintained its telephone lines and exchange in the City of Mitchell under and by virtue thereof.

III. That thereafter and on or about the 10th day of April, 1907, the City Council of the City of Mitchell, passed a resolution as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys and public grounds of said city, all conductors, manholes and other property and necessary for applying to the citizens of said city and the 179 public in general, communication by telephone and other improved appliances."

That thereafter the defendant continued its and does now operate its telephone lines and exchange in the city of Mitchell under and by virtue of the consent granted by the city of Mitchell in said ordinance and resolution.

IV. That Section 69 of the Act of March 20th, 1897, and by Section 14 of the Act of March 20th, 1907, it was and is now provided that the taxes to be paid by telephone companies in this state be assessed and levied by the State Board of Equalization and that the taxes so assessed and levied "shall be in lieu of all other taxes." That by reason of such statutory provisions, all ordinances and resolutions of the City of Mitchell, providing for the payment of one tax by the defendant to said city, are in so far as they do provide for such tax, without authority of law and void.

That the City of Mitchell is without power or authority to levy, demand and receive from this defendant any tax, whatever whether the same be by levy and assessment on its property situated in said city or by way of a per centum on its gross receipts, arising from its operation in said city.

V. The defendant for further assurance and for way of reconciliation against the City of Mitchell, relying upon such and all of the acts on aforementioned on fifth, allows that assessment and on the 15th day of July, 1888, the City of Mitchell be and through its Treasurer demanded of the defendant that it pay to the City of Mitchell the sum of Three Hundred Dollars as a fine from the City for the year ending May 31st, 1888.

VI. That this defendant promised against the payment of said fine, but under threats of the officers of said City that it would invoke the powers reserved in Section 4 of the ordinance or not to plaintiff's complaint, the defendant paid to the Treasurer of said city, and sum of Three Hundred Dollars, according the treasurer's receipt therefor.

That on or about the 1st day of December, 1888, the City of Mitchell, be and through its City Treasurer demanded of the defendant that it pay to the City of Mitchell, the sum of Three Hundred Twenty and 96/100 Dollars as a fine from the City for the year ending May 31st, 1888. That this defendant promised against the payment of said fine, but under threats of the officers of said city that it would invoke the powers reserved in Section 4 of the ordinance or not to plaintiff's complaint, the defendant paid to the treasurer of said city and sum of Three Hundred Twenty and 96/100 Dollars, according therefor the Treasurer's receipt.

That during the years ending May 31st, 1889, 1890, 1891, 1892, 1893, the defendant at the several sessions and meetings of the City of Mitchell, San Bernardino County, served in the City of Mitchell of the several bills calling for assessment and fines. That on each of the said dates he paid the said City of Mitchell an assessment of one hundred dollars toward the defendant and the City of Mitchell has never paid the defendant for any assessment levied or any work done.

Wherefore, this defendant, herein defendant against the City of Mitchell, for the sum of \$1,000.00 with interest as from June 1st, 1888, and on April 1st from December 31st, 1888, will agree with the sum of the above.

E. H. 9915.
Witness the defendant.

By the foregoing answer and reconciliation the defendant will be informed by the plaintiff, settling 1888, 1889, and 1890.

Right.

Thus ends the plaintiff and agreeing to defendant's reconciliation and with its paragraph V of defendant's answer, here that the defendant promised against the payment of the sum of Three Hundred Dollars to the City of Mitchell as a fine from the City for the year ending May 31st, 1888, and that defendant did not pay to the defendant under threats of the officers of said city that it would invoke the powers reserved in the 4 of the ordinance or not to plaintiff's complaint.

Plaintiffs further replying to said counter-claim deny that the defendant protested against the payment of the said sum of Four Hundred Twelve and 30/100 dollars as "a franchise tax" for the year ending May 31st, 1906, and that said sum was paid by the defendant under threats of the officers of said city that it would invoke the powers reserved in Sec. 6 of the ordinance set out in plaintiff's complaint.

Plaintiffs further deny that several sums were paid by the defendant to the said City of Mitchell, under pressure or duress or threats of any kind, and allege the fact to be that said sum for the years ending May 31st, 1905, and 1906, were so paid voluntarily and without objection by the defendant under the provisions of said ordinance No. 135 as set out in the complaint herein.

173 Plaintiff further replying to said defendant's counter-claim deny that the defendant during the years ending May 31st, 1905, 1906, 1907 and 1908, or at any other time, at the special instance and request of the City of Mitchell, furnished telephone service to the said City of Mitchell of the reasonable value of \$159.00 per annum, or of any other value, and alleges the fact to be that any telephone service furnished during said years to the city of Mitchell by the defendant, has been furnished to said city by virtue of and in compliance with the provisions of Section 4 of said Ordinance No. 135, as set out in the complaint herein; that said telephone service has been furnished by the defendant to the City of Mitchell under said Ordinance No. 135 free of any charge to said city, voluntarily and without objection by said defendant.

Plaintiffs further deny each and every other allegation of defendant's said counter-claim not herein otherwise admitted.

Wherefore, the plaintiffs pray that the said defendant's counter-claim be dismissed and that they have judgment as prayed for in the complaint.

Lauritz Miller,
Attorney for Plaintiff.

On the 3rd day of December, 1908, said cause was submitted to the Court on an agreed statement of facts, and the following findings of fact and conclusions of law were made by the Court, on the 13th day of December, 1909, omitting venue and title:

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Findings of Fact.

I. That plaintiff, the City of Mitchell, now is and at all times hereinafter mentioned has been a municipal corporation duly organized under the laws of the State of South Dakota, as one of the cities of said state.

II. That the plaintiff, A. E. Hitchcock, is the duly elected, qualified and acting Mayor of the City of Mitchell, South Dakota, and a member of the City Council of the City of Mitchell, and has been such since the fourth day of May, 1908, the plaintiffs' Clarion D. Hardy, John McDougal, John Michaels, P. H. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle and C. E. Reeves are the duly elected,

qualified and acting aldermen of of the City of Mitchell and members of the City Council of said City of Mitchell, and have been such from the fourth day of May, 1908.

III. That the defendant now is and at all times hereinafter mentioned has been a corporation duly incorporated and existing under the laws of the State of South Dakota.

IV. That the plaintiff, the City of Mitchell, by and through its common council, on the 11th day of May, 1898, passed and adopted the following Ordinance known as Ordinance No. 135 of the City of Mitchell, South Dakota:

Ordinance No. 135.

(See pages 22 to 24.) (Transcript pages 159 to 162.)

that said ordinance received a majority vote of the members of said common council in regular meeting assembled, that said ordinance was duly approved by the Mayor of said City on the 11th day of May, 1898, and was duly published as required by law and 175 went into effect on or about the 11th day of May, 1898, as one of the ordinances of said city, and is now in full force and effect. That said ordinance was regularly passed, approved and published.

V. That F. B. Elce, the grantee in said Ordinance No. 135, duly accepted the terms and conditions of said ordinance, and that under and in pursuance thereof the said grantee therein, F. B. Elce, installed a local telephone system in said City of Mitchell, S. Dak., and used and occupied the streets, alleys and public grounds and highways of said city with the poles, wires and fixtures used in the operation of said telephone system, under the restrictions, limitations and conditions of said Ordinance No. 135; that the said F. B. Elce within six months after the passage, approval and publication of said ordinance No. 135, did have not less than twenty telephones installed and in successful operation in said city as provided by said ordinance, and that said F. B. Elce conducted and operated said local telephone system in said City of Mitchell, South Dakota, in accordance with and under the terms and conditions of said Ordinance No. 135, until on or about the 3rd day of June, 1904.

VI. That on or about the 3rd day of June, 1904, the said F. B. Elce, for a valuable consideration, sold, conveyed and assigned said local telephone system, together with the poles, wires and fixtures used in connection therewith, and all the rights and privileges granted by said Ordinance No. 135 to the grantee therein, his associates, heirs and assigns, to the Dakota Central Telephone Lines, a corporation duly incorporated and existing under the laws of the State of South Dakota.

176 VII. That on or about the 2nd day of October, 1904, the defendant corporation through mesne conveyance from the said Dakota Central Telephone Lines, for a valuable consideration, became the purchaser and owner of said local telephone system in said City of Mitchell, together with all the poles, wires and fixtures

used in connection therewith, and of the rights and privileges granted by said Ordinance to the grantee therein, his associates, heirs and assigns; that ever since said 2nd day of October, 1904, the defendant corporation has owned, operated and conducted said telephone system in said City of Mitchell, South Dakota.

VIII. That the gross receipts from said local telephone system for the year ending May 31st, 1902, exceeded the said sum of \$2400.00 that up to and including the year ending May 31st, 1904, the said F. B. Elce, grantee in said Ordinance No. 135, paid to said City of Mitchell, the said ten per cent of the amount in excess of said sum of \$2400.00 received by him as gross receipts from said telephone system. That the taxes for the years ending May 31st, 1905 and 1906 were paid by defendant without protest, but on demand of the City in the ordinary course of business. That such payments were on the dates and in the amounts shown by the receipts given therefor as follows:

No. 1865.

CITY TREASURER'S OFFICE,
MITCHELL, S. D., July 5, 1905.

Received of Dak. Cent. Tel. Lines, by C. E. Reeves, Manager,
Three Hundred and No/100 Dollars for Franchise Tax,
177 telephone lines, in full to June 1st, 1905.

H. R. KIBBEE,
City Treasurer.

Original.

No. 2287.

CITY TREASURER'S OFFICE,
MITCHELL, S. D., Dec. 3, 1906.

Received of Dakota Central Tel. Co., C. E. Reeves, Mgr., Four
Hundred Twelve and 30/100 Dollars, for Payment on Franchise
tax, year ending May 31st, 1906.

H. R. KIBBEE,
City Treasurer.

IX. That the gross receipt of the defendant corporation from said local telephone system in said City of Mitchell, for the year ending May 31st, 1907, amounted to the sum of \$10,025.00; that ten per cent of said gross receipts in excess of said sum of \$2400.00 for the said year ending May 31st, 1907, amounts to the sum of \$762.50; that no part of said sum has been paid by the defendant to the said City of Mitchell although said sum became due and payable on the 1st day of June, 1907; that the plaintiffs duly demanded payment of said sum from the defendant, but defendant wholly refused to pay said sum and denies all liability therefore under said Ordinance No. 135.

X. That the gross receipts of the defendant corporation from the

said local telephone system in the said City of Mitchell, for the year ending May 31st, 1908, amounted to the sum of \$12,092.75; that ten per cent of said gross receipts in excess of the said sum of \$2400.00 for the said year ending May 31st, 1908, amounts to the sum of \$969.27; that no part of said sum has been paid by the defendant to the said City of Mitchell, although said sum became due and payable on the 1st day of June, 1908; that the plaintiffs duly demanded payment of said sum from the defendant, but defendant wholly refused to pay said sum and denies all liability therefor under said Ordinance No. 135.

178 XI. That defendant corporation was chartered under the laws of South Dakota to construct, own and operate telephone lines in South Dakota and is now engaged in operating both local and long distance telephone lines in and to the City of Mitchell.

XII. That on or about June 7th, 1904, the City Council of the City of Mitchell passed an ordinance in words and figures as follows:

(See Pages 28-29.) (Transcript pages 167 to 169.)

That said ordinance was regularly passed, approved and published.

XIII. That thereafter and on or about the 10th day of April, 1907, the City Council of the City of Mitchell, passed a resolution as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys, and public grounds of said city, all conduits, manholes, and cables proper and necessary for supplying to the citizens of said city and the public in general, communication by telephone and other improved appliances."

That said Resolution was regularly passed, approved and published.

XIV. Defendant having withdrawn that part of its counterclaim for telephone services, no findings are made thereon.

Conclusions of Law.

Upon said Findings of Fact, the Court finds as a matter of law as follows:

I. That the City of Mitchell was without power or authority to impose a gross earnings or charter tax as a condition of its consent to erect, construct or maintain telephone lines and exchanges in the City of Mitchell.

II. That that portion of the ordinance of May 11th, 1898, known as Ordinance No. 135 which imposes a gross earnings or franchise tax, is void.

IV. That the plaintiff is not entitled to recover in this action.

V. That the payment of the taxes for the years ending May 31st, 1905 and 1906 were voluntarily made under protest or by reason of threats or under duress.

VI. That the defendant is not entitled to recover on account of taxes paid for the years 1905 and 1906.

VII. That defendant is entitled to recover its costs and disbursements in this action.

Let judgment be entered accordingly.

By the Court:

FRANK B. SMITH, *Judge.*

Attest:

S. CATTRELL,

Clerk of Circuit Court.

180 Thereafter, on the 13th day of December, 1909, judgment was rendered on the foregoing findings, which judgment was entered on the said 13th day of December, 1909, and is as follows, omitting venue and title:

Judgment.

The above entitled cause having been submitted to the Court without a jury, and the Court having made and filed its findings of fact and conclusions of law, in which the court found that the plaintiff was not entitled to recover on the matter sued upon and that the defendant was not entitled to recover its counter-claim, and that the defendant was entitled to recover its costs and disbursements in this action.

Now therefore, on motion of T. H. Null, attorney for defendant, it is

Ordered and adjudged that the plaintiff's complaint and the defendant's counterclaim herein be dismissed, and the defendant, the Dakota Central Telephone Company, recover of the plaintiff, the City of Mitchell, its costs and disbursements in this action, taxed and allowed herein at \$—.

Granted December 13, 1909.

By the Court:

FRANK B. SMITH, *Judge.*

Attest:

S. CATTRELL,

Clerk of Circuit Court.

Thereafter, on the 14th day of June, 1910, Notice of Appeal was filed, and is as follows, omitting venue and title:

Notice of Appeal.

To T. H. Null, Attorney for Defendant in the above entitled action, and to S. Cattrell, Clerk of the Circuit Court in and for Davison County, South Dakota:

181 Please take Notice that the plaintiffs named in the above entitled action hereby appeal to the Supreme Court of the State of South Dakota, from that part of the judgment rendered by the above named Court herein and entered on the 13th day of

December, 1909, in favor of the above named defendant and against the said plaintiffs, which adjudges that the plaintiff's complaint herein be dismissed, and that the said defendant recover of the plaintiff, the City of Mitchell, its costs and disbursements in said action.

Dated this 10th day of January, 1910.

Lauritz Miller,
Attorney for Plaintiffs.

Due and personal service, by copy, of the above notice of appeal, at the City of Huron, Beadle County, South Dakota, on this 11th day of January 1910, is hereby admitted.

T. H. Null,
Attorney for Defendant.

Due and personal service, by copy, of the above notice of appeal at Mitchell, County of Davison, State of South Dakota, on this 14th day of January, 1910, is hereby admitted.

S. Cattrell,
*Clerk of the Circuit Court of
Davison County, South Dakota.*

and that a true copy of the said amended conclusions of law and judgment, as made and entered by the said Circuit Court of Davison County, South Dakota, in compliance with the directions of said Supreme Court are as follows:

(Omitting venue and title.)

This action having been tried at the November term, 1908, of this court, before the court without a jury, and the Court having made Findings of Fact and Conclusions of Law therein, which are of record, and the court having, on the 13th day of December, 1909, rendered judgment thereon for the defendant and against the plaintiff, for the dismissal of the plaintiffs' complaint and for costs to the defendant, and in favor of the plaintiffs against the defendant, for the dismissal of the defendant's counterclaim; and the plaintiffs having duly appealed to the Supreme Court of the State of South Dakota, from that part of said judgment dismissing the plaintiffs' complaint and awarding costs to the defendant, and the said Supreme Court having on the 24th day of May, 1910, wholly reversed that part of said judgment appealed from, and the record in this cause having been duly remitted from said Supreme Court to this court with directions that this Court amend its conclusions of law to correspond with the opinion of said Supreme Court; and due notice of such remittance having been given to the defendant as appears by proofs now on file; and due notice of this application for these amended conclusions of law having been given and proof of such notice having been filed;

Now therefore, In compliance with said mandate of the Supreme Court and on motion of Lauritz Miller, attorney for plaintiffs, the conclusions of law heretofore made and filed in this cause are hereby amended to read as follows:

183

I.

That the City of Mitchell had full power and authority to impose a gross earnings or franchise charge as a condition of its consent to erect, construct or maintain Telephone Lines and exchanges in the City of Mitchell.

II.

That that portion of the ordinance of May 11th, 1898, and known as Ordinance No. 138 of the City of Mitchell, South Dakota, which imposes a gross earnings or franchise charge is valid.

III.

That the ordinance of May 11th, 1898, and known as Ordinance No. 135, of the City of Mitchell, South Dakota, was not repealed or modified by the ordinance of June 7th, 1904, and known as Ordinance No. 180 of the City of Mitchell, South Dakota.

IV.

That the ordinance of May 11th, 1898, and known as Ordinance No. 135 of the City of Mitchell, South Dakota, was not modified or repealed by the Resolution adopted by the City Council of the City of Mitchell, South Dakota, on the 10th day of April, 1907.

V.

That the gross earnings or franchise charge imposed by the ordinance of May 11th, 1898, and known as Ordinance No. 135, of the City of Mitchell, South Dakota, is a charge in the nature of a rental fee for the use of the streets and alleys of the City of Mitchell, and is not a tax within the meaning of Section 2125 of the Revised Political Code of South Dakota, of the year 1903, and Chapter 184 64 of the Session Laws of South Dakota for the year 1907.

VI.

That the plaintiffs are entitled to recover the amount sued for in this action.

VII.

That the payment of the gross earnings charges for the years ending May 31st, 1905 and 1906, were voluntarily made by the de-

fendant, and that said payments were not made under protest or by reason of threats or under duress.

VIII.

That the ordinance of May 11th, 1898, and known as Ordinance No. 135 of the City of Mitchell, South Dakota, is a binding contract between the City of Mitchell and the defendant herein, the Dakota Central Telephone Co., and such defendant is now estopped from pleading that the conditions in said ordinance No. 135 were ultra vires the City of Mitchell, South Dakota.

IX.

That the defendant is not entitled to recover on its counterclaim on account of the gross earnings charges paid by it for the year- 1905 and 1906.

X.

That the plaintiffs are entitled to recover their costs and disbursements in this action.

Let judgment be entered accordingly.

Dated at Mitchell, South Dakota, the 25th day of October, 1910.
By the Court:

FRANK B. SMITH,
Judge of Circuit Court.

Attest:

S. CATTRELL,
Clerk of Circuit Court.

185 Thereafter, on the 25th day of October, 1910, judgment was entered, and is as follows, omitting venue and title:

Judgment.

This action having been tried at the November Term, 1908, of this court, before the Court without a jury, and the Court having made Findings of Fact and Conclusions of Law therein, which are of record, and the Court having, on the 13th day of December, 1909, rendered judgment thereon for the defendant and against the plaintiffs, for the dismissal of the plaintiffs' complaint and for costs to the defendant, and in favor of the plaintiffs against the defendant, for the dismissal of the defendant's counterclaim; and the plaintiffs having duly appealed to the Supreme Court of the State of South Dakota, from that part of the said judgment dismissing the plaintiffs' complaint and awarding costs to the defendant, and the said Supreme Court having on the 24th day of May, 1910, wholly reversed that part of said judgment appealed from, and the record in this cause having been duly remitted from said Supreme Court to this

Court with directions that this court enter judgment in favor of the plaintiffs for the amount found due and unpaid to said plaintiffs by the Ninth and Tenth Findings of Fact of this Court, and for costs, both in this court and in the Supreme Court; and due notice of such remittance having been given to the defendant as appears by the proof now on file; and due notice of application for this judgment having been given, and proof of such notice having been filed;

186 Now, therefore, in compliance with said mandate of the Supreme Court and on motion of Lauritz Miller, attorney for the plaintiffs,

It is ordered and adjudged, That the plaintiffs, the City of Mitchell, A. E. Hitchcock as Mayor, Clarion D. Hardy, John McDougal, P. H. Kelly, A. A. Truax, Joseph Koch, A. H. Doyle, and C. E. Reeves as members of the City Council of the City of Mitchell, South Dakota, have and recover of the defendant, Dakota Central Telephone Co., the sum of two thousand sixty-six dollars and thirty-two cents (\$2066.32) principal and interest, together with the sum of One Hundred Twenty-six dollars (\$126.00) costs on appeal, and the sum of \$21.50 dollars costs in this Court, which costs shall be taxed by the clerk of this Court and by him inserted herein, and that the defendant's counter-claim be and the same is hereby dismissed.

Dated at Mitchell, South Dakota, the 25th day of October, 1910.
By the Court:

FRANK B. SMITH, *Judge.*

Attest:

S. CATTRELL,
Clerk of Circuit Court.

That said judgment was appealed to and affirmed by the Supreme Court of the State of South Dakota on the 20th day of June, 1911, and the decision of said case is reported in 27 South Dakota, 509.

187 XIII. That on or about March 31, 1911, complainant caused to be presented to the City Council of said City of Mitchell, the following letter and application, and requested the passage of the said resolution which was presented to the said City Council by the complainant in connection with its said letter and application:

"31 March, 1911.

Mr. L. L. Ness, City Auditor, Mitchell, South Dakota.

DEAR SIR: As per our conversation yesterday I am sending you herewith communication addressed to your Council and also form of resolution which we would like to have you hand to some Alderman to be introduced at your next Council meeting to enable us to proceed with the contemplated work.

Respectfully yours,

DAKOTA CENTRAL TELEPHONE CO.,
By J. L. W. ZEITLOW, *Pres.*"

"To the Hon. Mayor and City Council of the City of Mitchell.

GENTLEMEN: As we are very much crowded for facilities to take care of the present telephone service satisfactorily to ourselves as well as our subscribers, being on account of our outside construction getting old and is overloaded and our operating facilities being taxed to the limit.

188 Keenly realizing these conditions, over a year ago, we erected a new building and planned at the same time to install an up-to-date system to operate from the new building. On account of the adverse decision rendered, we do not feel warranted in expending such a vast amount of money for a new plant as we are in no position to fix a rate for service above the rate now in force at Mitchell without the consent of the Railroad Commission and as this Commission has often, altho' informally indicated that they did not care to take up telephone rate matters in isolated cities, unless cities in question demanded better and more service.

We asked your honorable body to join us in a petition to said Railroad Commissioners that they fix a rate which would net us 8% on the investment. That is, on the cost of the new plant.

As your honorable body has taken no definite steps in this matter and the season is rapidly advancing, we are naturally anxious to know what we may expect so as to plan accordingly. The demand for service is increasing and complaints of poor service reach us frequently altho' we are trying hard to avoid this. About ten days ago our Engineer visited your City under instructions to prepare plans which would temporarily relieve the congested condition. He now turns in an estimate which calls for an expenditure of a large sum of money without giving permanent relief. Some of the work planned by him however, can be of a permanent nature as it consists of underground work on some streets where there is none now. Also the placing of poles, and wires in unoccupied streets and alleys.

We would therefore respectfully petition your honorable body to pass a resolution allowing us to proceed with this work also 189 designating the location of the underground work, poles and wires necessary.

Respectfully yours,

DAKOTA CENTRAL TELEPHONE CO.,
By J. L. W. ZEITLOW, President."

That the resolution referred to in the foregoing communication was as follows:

"Be it resolved, By the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, its successors or assigns to place, construct and maintain in and under the streets and alleys and public grounds of said city, such underground conduits, manholes, cables, poles and wires as are necessary to properly supply the present demand for telephone service within said City of Mitchell; such conduits, manholes, cables, poles and wires to be located under the instruction of

the City Council or the proper committee designated for that purpose.

Be it further resolved that this City Council ask the railroad commission to fix a just and adequate rate for improved telephone service within this City such as will give the Dakota Central Telephone Company a just compensation taking into consideration the investment, expense of operation, depreciation and service rendered."

190 That said above petition of the complainant before said defendant, City of Mitchell, was refused and rejected by said City Council.

That thereafter on or about March 26th, 1912, the City Council of said City passed and adopted the following resolution:

"Whereas, the franchise of the Dakota Central Telephone Company to use the streets, alleys and public grounds in the City of Mitchell, South Dakota, for the erection and maintenance of a local telephone system, will expire May 11th, 1913, and

Whereas, the present franchise fixes the maximum rates that the Dakota Central Telephone Company may charge for telephone services within said City as follows:

\$2.00 per month for business houses, and \$1.25 per month for residence houses, and

Whereas, it will be necessary for the City Council of said City soon to grant a new telephone franchise to some company or person and to prescribe the terms and conditions of said franchise, and

Whereas, the City Council of said City now is, and for some time past has been engaged in a controversy with said Dakota Central Telephone Company relative to the rights of the City and the obligations of the Telephone Company regarding telephone matters, and also the terms and conditions upon which a new franchise might be issued, and

Whereas, the Dakota Central Telephone Company is now attempting to evade the provisions of the present franchise by contracting with individual subscribers for automatic telephones and for different rates than prescribed in said franchise,

191 Now therefore, Be it resolved by the City Council of the City of Mitchell, South Dakota, in special session duly assembled this 26th day of March, 1912:

1. That the City Council consider it a breach of good faith on the part of the Dakota Central Telephone Company to attempt to enter into special contracts with individual citizens of the City of Mitchell relative to the kind of telephones to be installed and the rates to be charged therefor;

2. That said city council considers such action on the part of the Dakota Central Telephone Company as an attempt to circumvent said Council and to force said Council into making an adjustment of said telephone matters with the said company on terms unfair to said city.

3. That said City Council considers that it has the power and authority, under the Constitution of the State and the decisions of both State and Federal courts to grant telephone franchises in the

City upon such terms and conditions as such council shall deem best including the power to prescribe the kind of telephone service to be furnished and the maximum rates which may be charged therefor;

4. That said City Council considers that any action on the part of individual citizens in contracting with said Dakota Central Telephone Company for the kind of telephone service to be furnished and the rates to be charged therefor, will greatly hamper and embarrass the said City Council in securing the best possible adjustment for the city of the telephone problem now confronting said City.

192 Adopted by the City Council of the City of Mitchell, this 26th day of March, 1912.

A. E. HITCHCOCK, *Mayor.*

Attest:

[SEAL.] N. H. JENSEN,
City Auditor."

Resolution.

Whereas, the Dakota Central Telephone Company is attempting to contract with the individual citizens of the City of Mitchell relative to the kind of telephone service to be furnished and the rates to be paid therefor,

Now therefore, be it resolved by the City Council of the City of Mitchell, S. D., in special session duly assembled this 26th day of March, 1912;

1. That said City Council hereby expressly disavows any consent to, or participation in, any of such contracts or proceedings, either on the part of said Telephone Company or on the part of any of the citizens of said city;

2. That said City Council shall in no manner, either directly or indirectly, expressly or impliedly, be held to consent to, or to have consented to, any agreement or contract by and between said Dakota Central Telephone Company and any of the citizens of said City relative to the kind of telephone service to be furnished the citizens of said city and the rates to be charged therefor;

3. That no contract or agreement made by and between said Dakota Central Telephone Company and any citizen of said city shall in any way be binding upon the City Council of said City, nor shall any such contract or agreement be construed to extend the scope or term of the present telephone franchise under which said telephone company is operating, nor to grant a new telephone franchise, nor to grant any additional rights or privileges to said Telephone Company other than the rights and privileges now enjoyed by said Telephone Company under the existing franchise;

4. That said City Council hereby reserves to itself, for the benefit of the whole City, all the rights, powers, duties and authority granted to it by the Constitution of the State and confirmed to it by the Courts relative to telephone matter, and said Dakota Central Telephone Company is hereby reminded that the City Council of the

City of Mitchell, S. D. is the constitutional body with whom negotiations for a new telephone franchise, or for privileges in relation to the use of the streets and alleys of said City must be considered;

5. That the City Auditor of the City of Mitchell, S. D. be, and he is hereby instructed to serve a copy of these resolutions, upon said Dakota Central Telephone Company by forthwith sending to the President of said Company a copy of these resolutions, by registered mail.

Adopted by the City Council of the City of Mitchell this 26th day of March, 1912.

[SEAL.]

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor."

And that true copies of said resolution were duly served upon the said complainant before the said complainant began the installation of said automatic telephone system in said City of Mitchell.

It is agreed that this stipulation is made subject to any objection either party may have as to the materiality or relevancy of any of the facts stated therein.

194 It is further stipulated that the intent and meaning of the term "long distance telephone" as used in ordinance- 174 and 180 being one of the issues to be determined in this case, it is hereby stipulated that the use of the term "long distance" and "toll lines" in this stipulation shall not be considered as any evidence of the intent or meaning of said term "long distance telephone" as used in said ordinances, except as same may be considered where recited in said ordinances and other documents appearing in this stipulation in which case the intent and meaning of said terms are to be considered the same as if such documents were received in evidence independent of this stipulation.

SPANGLER & HANEY,
NULL & ROYHL,
Solicitors for Complainant.
LAURITZ MILLER AND
EDWARD E. WAGNER,
Solicitors for Defendant.

Evidence Submitted on Behalf of the Complainant.

Mr. M. L. LANE.

Direct examination by Mr. Null:

I reside in Minneapolis and am commercial superintendent of the Northwestern Telephone Company, and have been engaged in the telephone business for more than twenty years, and my experience has covered all phases of the telephone business from lineman to

195 manager. From 1890 to 1908 I was familiar with the various types of telephone instruments and particularly with the form of telephone transmitter.

At this point it was stipulated that all testimony of this witness concerning the matter of the telephone in use during the time covered by his experience should be taken subject to the following objection made by the defendant. That such evidence is incompetent, irrelevant and immaterial, in that it does not tend to prove any issue in this case, and that it is an attempt to construe the meaning of the ordinances involved in this action by oral and extrinsic evidence, and that the meaning, scope and effect of such ordinances cannot be proved by such evidence.

Witness resumed as follows:

When I first engaged in the telephone business the "Blake Transmitter" was in use, the transmitter is that portion of the telephone which the user speaks into when using the telephone. The Blake transmitter consisted of a carbon button, a platinum point and a diaphra-m and was found to be an efficient transmitter for transmitting messages a short distance, that is 20 or 25 or 30 miles. This instrument was in general use in local exchanges from 1889 to about 1904 or 1905. The type of transmitter now in use is what is known as the "long distance" transmitter, or "solid back." This transmitter was put on the market in 1893 at which time it began to be substituted for the Blake transmitter, but this substitution did not

196 become general until about 1896, 1897 or 1898 in the entire United States, and in some localities it was in general use before that date. The solid back transmitter was first used for long distance business and as soon as its increased efficiency became generally known it was substituted for the old transmitters as rapidly as the manufacturers could produce them both in local and long distance work. This change was made between 1896 and 1904 or 1905. At first higher rate was paid for the use of the "solid back" transmitter than for the old type.

This question was then asked:

"With the Blake transmitter what was the custom,—What was the custom with reference to the subscriber in using the toll lines with reference to the telephone from which he would talk?

This was objected to as incompetent, irrelevant and immaterial, for the reason it don't tend to prove any of the issues in this case; for the further reason that no proper foundation has been laid, and it don't appear that the defendant is in any way bound by this custom; and for the further reason that it seeks to interpret the ordinances in question, in this litigation, by oral and extrinsic evidence outside of the ordinances themselves.

Answer. Both the representatives of the company and the subscribers, from actual experience, knew that it was impossible to carry on a satisfactory conversation for a considerable distance with this transmitter. And after the installation of the solid back transmitter the subscriber, in preference to attempting to talk through this transmitter, would come to the central office, or to such point as

the company had located one of its long distance transmitters, and use the long distance transmitter or solid back in the place of the Blake for a long distance conversation.

197 Mr. Miller: I move to strike out the answer of the witness wherein he recites that both the customer and the operators knew that it was impossible to talk over the Blake transmitter, for the reason the same is not responsive and a mere conclusion of the witness.

After the "solid back" transmitter had been installed in a subscriber's place of business, he was able to talk over longer distances without going to a central station than he could with the old Blake transmitter.

Q. Now, this solid back transmitter you have spoken of, what was the trade name by which such instrument was generally known among the telephone people?

Mr. Miller: Objected to as incompetent, irrelevant and immaterial and not tending to prove any of the issues in this case and no proper foundation has been laid for it and for the further reason it don't appear that the trade name of this instrument was taken into consideration at the time of the passage of the ordinance in litigation; and for the further reason it is in no way binding on this defendant, and that it is a mere attempt to prove the meaning, scope and effect of the ordinances of the City of Mitchell involved in this litigation, by oral and extrinsic evidence outside of the said ordinances themselves, and that this is not the proper method of proving such meaning, scope and effect.

A. Long distance transmitter.

Cross-examination by Mr. Miller:

I would not say I am an expert telephone man, but I think I am an experienced telephone man. The main difficulty in talking over long distance with the Blake transmitter was not 198 that the voice would not carry, but that it would blurr or be indistinct and the carbon button was apt to break. The outside wiring used is the same for both transmitters, and there has been a gradual improvement in the telephone receiver and in all telephone apparatus. The "solid back" transmitter was patented in 1892, and they commenced the construction of long distance lines about that time. Prior to 1892 there was practically no long distance lines in the country. The telephone I am now working for has 730 telephone exchanges and the "long distance transmitter" is used exclusively in all of them for both local exchange work and for long distance work. As a matter of fact, this so-called long distance transmitter is an improvement over the Blake transmitter not only for long distance but for local exchange work, and the Blake transmitter is now obsolete. I have not known of any Blake transmitters in use anywhere since 1898. They were discontinued in Minneapolis & St. Paul about 1894 or 1895. All up to date exchanges have been using this

long distance transmitter for more than ten years, and any exchange that has not been using this transmitter during that time has been behind the times and have not been using the best and most approved and up to date telephone appliances on the market. This long distance transmitter is simply an improvement over what they formerly had in transmitters, the same as the present receiver is an improvement over the receiver they had ten or fifteen years ago.

199 The main difference between the Blake transmitter and the so-called "long distance transmitter" is that the Blake transmitter the induction coil had more resistance than in the Long Distance transmitter and the carbon in the former was a solid piece while the carbon in the latter was granulated and enclosed in a little water tight compartment.

CHARLES E. HALL.

Direct examination by Mr. Null:

I reside at Omaha, Nebraska, and now am and for thirty years have been engaged in the telephone business. For the past year I have been Vice President and general manager of the Iowa Company, the Nebraska Company and the Northwestern and for four years prior to that I was General Superintendent of those companies. I have been with the Iowa Company since 1884; during that time I have been familiar with the instruments in use in the telephone business.

The following testimony was submitted over defendant's objection that it was incompetent, irrelevant and immaterial, in that it don't tend to prove any of the issues in this case, and for the further reason that no proper foundation has been laid and that it is not binding on the defendant; and for the further reason it is an attempt to prove the scope, meaning and effect of the ordinances involved in this litigation by oral and extrinsic evidence outside of the ordinances themselves and this is an improper method of proving such meaning, scope and effect of such ordinances.

The early telephone instruments were equipped with magneto calls, transmitters, receivers and batteries. The Blake transmitter 200 was in use in 1884, until June 1905, more or less; their use gradually diminished along toward 1905, when none or very few were used. The capacity as to distance of the Blake transmitter depended upon the condition and character of the line, perhaps it was not over 50 or 75 miles over good iron lines. Long distance lines were generally constructed after 1894, and copper wire came into use in 1889 which would carry messages longer distances than the iron wire. The "solid back" transmitter did not come into extended use until about 1901 or 1902. They were first introduced in toll line business in 1893 and 1894. Prior to the time when the solid back came into general use, the subscriber had difficulty in talking up to 100 or more miles and he would generally go to the central office or long distance to talk, but after the solid back trans-

mitter had been furnished, the subscriber was generally able to talk over long distances from his office.

The subscribers of the Iowa Telephone Company prior to 1904, were supplied with the "solid back" or long distance transmitters as rapidly as the transmitters could be secured, and the rental charges for these were generally greater than for the Blake transmitter. During the time from 1893 to 1904 the "solid back transmitters" went under the trade name of "long distance telephones."

Cross-examination.

By Mr. Miller:

When I first started in the telephone business they used an old style of Blake transmitter similar to the later Blake transmitter, the later Blake transmitter was an improvement over — and 201 could transmit messages better and for a longer distance than the first Blake transmitter. Later there was a third Blake transmitter which was an improvement over all prior forms, and this in turn was superseded by the solid back. I have talked over two hundred miles with the improved Blake transmitter, but we could not get our subscribers to talk that far. We made our lines metallic in 1890 and 1891, and in 1893 we began to string copper wires and covered the state pretty generally with such lines, and in 1895, 1896 and 1897 we began to use the solid back transmitter. We do not call the transmitter now in use the granulated carbon transmitter, but it is held out to the world as the "solid back transmitter," as contradistinguished from the one which had the vibrating effect, so we have always spoken of it as the "solid back." We reported them as solid backs in our equipment between our shops. Our contracts are printed "long distance transmitters." The solid back transmitter was substituted for the Blake long distance type as fast as the former could be secured. As far as I know, all the local exchanges that I am familiar with are equipped with solid back transmitters and have been generally so equipped since the transmitters were placed on the market. All the different modifications and kinds of transmitters in general use now are based on the same principal as the solid back transmitter. I would say that this solid back transmitter is an improvement on the former as its predecessor was an improvement over the one it succeeded, and so on. The solid back transmitter is in use all over the country in both local exchanges and long distance lines, and the change to this type of transmitter 202 was made as soon as it was perfected and could be supplied to the public. I do not know of any other transmitters in use that are built on the principal of the solid back and these transmitters may be attached to the same kind of apparatus and the same kind of wire circuits as other instruments are used on. There is no difference in the receiver used, except some improvement. It was a general custom throughout the state of Iowa for the local companies to use the same type of transmitter as we use for long distance work, and this is also true of the Nebraska and two Dakotas and

Minnesota. The solid back transmitter is not peculiar or incident to the condition of the long distance company.

J. L. W. ZEITLOW, testified as follows:

Direct examination by Mr. Null:

I am the president of the Dakota Central Telephone Company, and have been such president since its organization.

The following testimony was submitted over defendant's objection that it is incompetent, irrelevant; that it does not tend to prove any of the issues in the case and that it is in no way binding upon defendant; that no proper foundation has been laid, and further reason that it is an attempt by oral and *excentric* testimony to prove the meaning, scope and effect of ordinance No. 174 and 180, of the defendant city, and that this is not the proper method of proving the meaning, scope and effect of such ordinance, and that the language of the ordinances themselves is the only evidence of such meaning, scope and effect, and for the further reason that the meaning, scope and effect of such ordinance has been heretofore determined by the Supreme Court of the State of South Dakota.

203 Witness: The Blake transmitters were in common use from 1883 to 1905 and 1906. That is, they were used principally in the earlier period and gradually disappeared in the latter. They were used principally in telephone exchanges in short lines. The solid back transmitter was patented in 1892 by Anthony C. White. They were first used for long distance purposes and were gradually put in service in local exchanges the first I knew of it from 1890 to 1896, and from that time on they were substituted as far as they could be had. Prior to the time they came in general use, they were sometimes supplied specially to subscribers who wanted special or better service over long distances. These solid back instruments were known by the trade name of "long distance telephone instruments." A successful conversation could be heard through the Blake transmitter from a distance of 25 to 100 miles according to the other condition of the line and construction; with a solid back, you could talk over a thousand miles. My company began to install the solid back transmitter for general use in local exchanges from 1898 to 1906. I mean by that, that we after that time did not use any other transmitter. I was president of the Dakota Central Telephone Lines company in 1904.

The following evidence was submitted without objection:

At the present time the company's telephone lines extend west of the City of Mitchell to Chamberlain and south to Yankton and Niobrara. One group of lines extends from Mitchell to Parker, one to Salem and one to Heron Lake, Minnesota, and Marshall, Minnesota, and one to Edgerly, North Dakota, Ft. Yates, Larri-
204 more and Fairmont, North Dakota. We also own the telephone lines extending east of Aberdeen to Ortizville, Minnesota, Browns Valley and Wheaton. There is a line between Mitchell and Aberdeen. Our company has some interstate busi-

ness between Aberdeen and Omaha, Sioux City and Omaha and Iowa and Nebraska points. The long distance business originating west of Mitchell passes through Mitchell, and the same is true of the business going to North Dakota. All through business from west and south of Mitchell is switched in Mitchell. All our toll lines passing through the city of Mitchell passes through the local exchange, but some of them are connected straight through. We do not have lines of our own extending to St. Paul or Minneapolis, but we handle that business by connection with the Northwestern telephone exchange at Salem, east of Mitchell, and at Yankton, South of Mitchell. I am familiar with the present exchange in Mitchell. It was completed in 1913, and is known as the automatic system. This system differs from the manual system in that in the automatic system the subscribers get into communication with one another without the interference of any operator or help at the central office. We used solid back transmitters in this exchange.

How are they classed with reference to long distance telephones or otherwise?

Mr. Miller: That is objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness; that it 205 don't tend to prove any of the issues in this case, and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances number 174 and 180 of the City of Mitchell involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has construed the meaning, scope and effect of such ordinances contrary to the contention of plaintiff in this action.

Answer. They are long distance transmitters and telephones. There are approximately between eleven and twelve hundred subscribers to the local exchange in Mitchell and about one-fourth of them are business telephones. The subscriber secures connections with the toll lines by inserting the finger in the place called "long distance" and rotating the dial to the stop and then letting the dial work back, and then the long distance operator puts the subscriber in connection with his party.

Cross-examination by Mr. Miller:

The carbon in the solid back transmitter performs practically the same office in the same way as the carbon did in the old Blake transmitters. In the old Blake transmitters the main difficulty was in getting the proper contact with the carbon and that difficulty has been overcome in the solid back transmitter. Wherever

206 we put in a local exchange now, we put in solid back transmitters exclusively. The Blake transmitter are obsolete at this time, and I do not know whether they are longer made.

None of our company's lines running through or from Mitchell are continuous into North Dakota, Minnesota, Iowa or Nebraska and when it is desired to send a long distance message either from or through Mitchell to any point in some other state, it is necessary to make one or more connections in the state outside of Mitchell.

Our company has about half a dozen long distance or toll stations in the City of Mitchell and any citizen of Mitchell could use the long distance telephone from any one of those stations regardless of the local exchange. The local automatic system or exchange in Mitchell could be removed without interfering with the long distance telephone business passing through Mitchell and the long distance wires in Mitchell terminate in the Central exchange office and are not used for local messages at all.

Exhibit A, being a portion of the telephone directory issued and used by the Dakota Central Telephone Company at the City of Aberdeen, South Dakota, and identified by the witness as containing instructions similar to those used in the company's other exchanges, was offered in evidence by defendant as a part of the cross-examination of Mr. Zeitlow. This exhibit among other things contained the following:

207 "14. All calls excepting the following, require that the dial be pulled four times; for these you will pull the dial but once:

4. Fire alarm.
6. Information Clerk.
8. Trouble Clerk.
9. Rural and Private Branch exchange operator.
Long distance, Toll operator."

"Long Distance Service.
Call No. "Long Distance."

This connects you with an operator who will take your call for points throughout the country, and will give rates. To make complaints, or for other information regarding the service, call Chief Operator No. 1411.

We reach over our own lines all Important Points in South Dakota, and connect with the Northwestern Telephone Exchange Company and the American Telephone and Telegraph Company through whom we reach all important points in the country."

When the operator answers which she will do by saying "Long Distance," first state your own name and number, and give the name of the person wanted, and the place, and other necessary directions for reaching him."

"Owing to the rapid increase in the size of this exchange, it is no longer possible for us to secure the O. K. of a subscriber, for the use of his telephone for Long Distance."

JOHN E. OSTLINE.

Direct examination by Mr. Null:

I am district wire chief of the Dakota Central Telephone Company, and have supervision of all local and long distance wires as well as the subscribers' instruments. I have been engaged 208 in the telephone business for ten years and six months.

I was in the employ of the Northwestern Telephone Company in Minneapolis for about six months in 1906.

Q. While you were in Minneapolis, were there any Blake transmitters in use at that time?

Mr. Miller: That is objected to as incompetent, irrelevant and immaterial; that it don't tend to prove any of the issues in this case and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances Number-174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has *constructed* the meaning, scope and effect of such ordinances contrary to the contention of the plaintiff in this case.

Answer. No, sir, there was not; not to my knowledge, there was not.

Witness further testified over the same objection as above, that the transmitter in use at that time was called the solid back long distance transmitter and that in the early days the instrument was designated as the "Blake Transmpter" and long distance transmitter, and many called it the solid back.

Cross-examination by Mr. Miller:

All transmitters now in use are of the solid back type, and this is used in all telephone work because it is the only kind they can get.

209 KEMPTON B. MILLER.

Direct examination by Mr. Null:

I have been connected with the telephone business for nearly twenty years, as examiner in the United States Patent Office, chief engineer of the Western Telephone construction Company, and Superintendent of the factory and member of the engineering corp- of the Kellogg switch board and Supply Company, a large manufacturer of telephone apparatus. For the past ten years, I have been consulting member of the firm of McMeen and Miller and have designed and built large and small telephone exchanges. I am the author of American telephone practice and the joint author with S. G. McMeen of Telephony. I have ben intimately connected with the telephone business since 1896, and was familiar with the transmitter formerly known as the Blake transmitter and also with

the solid back transmitter. The solid back transmitter was perfected about 1894, and was placed on the market to a limited extent shortly thereafter. From 1896 to 1898 while with the Western Construction Telephone Company they did not manufacture the Blake transmitter, but made a so-called granular carbon type.

After the solid back transmitters came upon the market this type of transmitter manufactured by the Bell Telephone Company were commonly called solid back transmitters. Independent concerns who made granular carbon transmitters sometimes referred to them

as solid back transmitters, because of their more powerful
210 nature. These instruments in those days were frequently referred to as long distance instruments. I hardly think this was in the nature of a trade name, but was largely used to distinguish them from the less powerful type of instruments. The name solid back has clung particularly to the Bell instrument. Instruments of the granular carbon type were also in the early days often referred to as Hunnings type of instruments, after the name of the inventor of the granular carbon idea.

As the solid back instrument was brought out, the Chicago Telephone Company, a bell concern, sometimes replaced the Blake with the solid back, and charged an increased rate, and they were then commonly referred to as long distance instruments. Independent companies would commonly call the new and improved transmitters, long distance instruments. These were usually, if not always of the so-called granular carbon type. It was a common custom among both Bell and independent companies after adopting the more popular granular carbon instruments to herald them as long distance instruments. The manufacturers advertised these improved types of telephones as long distance instruments regardless of whether they were to be used for long distance or local service.

Cross-examination by Mr. Hitchcock:

The Blake instrument began to go out of use with the advent of the granular carbon type, which was very effectively used by the Bell Companies about 1893 or 1894, perhaps somewhat earlier. If in the year 1900 telephone directories had placed at the bottom of its pages these words: "Subscribers with a star before are furnished
211 with a modern equipped telephone," that would have had the same meaning to me as the words "Long distance telephone." In the case of the telephone directory of the city of Topeka of 1903, which had on the second page of the first cover appears these two lines:

"Latest improved apparatus.
All long distance instruments."

I would say that the words, "All long distance instruments" meant some form of granular carbon instrument such as the solid back, and if these words had been omitted, they would have been included in the previous clause "latest improved apparatus" because that would carry with it the best type in telephone instrument then

known, which was the so-called granular carbon or long distance type, as that term was then used.

The telephone art has been a matter of development. The old form of Blake transmitter has gradually been superseded by improved forms capable of transmission over longer distances, and these being almost universally of the granular carbon type of which the solid back is a well known example.

From 1899 to 1904 while I was with the Kellogg Switch Board and Supply Company there were a large number of transmitters being placed on the market that were not of the solid back type. I think, however, that all, with possibly some exception, were of some form of granular carbon type. During this period my company and other independent companies were manufacturing and selling transmitters that were an improvement over the Blake Transmitter, and during this time the Kellogg company sold only one kind of transmitters for both local and long distance work. Some of

the other companies sold several types of transmitters and
212 they sold them with some distinction implied. The American Electric Telephone Company, the Stromburg Carlson Manufacturing Company, the Swedish American Telephone Company, the Eurika Telephone Company, the Monarch Telephone Company, the Chicago Telephone & Supply Company, the Sumpter Telephone Manufacturing Company, all put upon the market during this time telephones other than the solid back type, but all were of the granular carbon type, and all were claimed to be superior to the Blake transmitter. The granular carbon form of transmitter was an improvement over the Blake Transmitter. The efficiency of the transmitter depends largely on the characteristics of the line and the resistance and other electrical characteristics of the line, and I know of cases today in purely exchange service, even the most powerful transmitters are not capable of giving good transmission from one side of a city to another on account of the resistance and other electrical characteristics of the line.

T. C. BURNS.

Direct examination by Mr. Null:

I live in Chicago and am president of the American Electric Company, and have been such president for the past six years. I have been in the electrical manufacturing business for the past thirty years. My company is the successor of the American Electrical Telephone Company, and is engaged in manufacturing telephone apparatus or supplies. I manufactured telephone instruments from 1893 to 1904 and for a few months during that time, I manufactured the Blake transmitters, and after which we manufactured the "Hunning" or granular carbon type up to 1898. I
213 advertised these transmitters as the "Hunnings" long distance telephones. After 1898 we advertised them for a period as "new solid back long distance type" and the "American Beauty Long Distance Type."

The name appears on some of these telephone plates as "American

local and long distance independent system," and in other cases, simply American Electric Company, Chicago." In 1899 and 1900, we manufactured a transmitter called the gold electrode. We put both of these on the market. The gold electrode and the American Beauty were improvements on the White solid back type. Most all telephone companies advertised the granular type of transmitter as "long distance." This was quite common by companies in opposition to the Bell Company, which company was using to a large extent inferior instruments, and only giving the long distance granular carbon type to a few subscribers at a higher rental, and in many cases we instructed our promoters to advertise the fact that our instruments were the long distance type, and we made this as one of the inducements to grant franchises for local exchanges.

Cross-examination by Mr. Hitchcock:

Between 1898 and 1904 we manufactured and sold a granular carbon type of transmitter, the Gold Electrode, and the American Beauty, and we called those two general forms of transmitters, "long distance instruments."

214 During that time I was familiar with the transmitter being used by the Kellogg Switchboard Supply Company, and they put out a form of the granular carbon type in 1890, which were not much of a success, and these were succeeded by their present transmitter in 1901. I do not know whether they called their transmitters "long distance telephones" or not, but they were generally considered as long distance instruments. These instruments were put on both local and long distance work. There were other companies manufacturing instruments at that time. Among them, were the Victor Manufacturing Company, the Eureka Telephone Company, the Swedish Telephone Company, the Stromberg Carlson Telephone Company, and the Farr Telephone Construction Company and the Western Telephone Manufacturing Company. The Victor people made a granular carbon transmitter, and advertised it as a long distance telephone. It was used both for local and long distance work. The Eureka Telephone Manufacturing Company manufactured the same type and also called it the long distance telephone transmitter. The same was true of the Swedish American Telephone Company and the Stromberg Carlson Company and the Farr Telephone Construction Company. The Western Telephone Construction Company manufactured the Blake form of transmitter from 1894 and 1895, after which they manufactured the granular type, and they all advertised their phones as long distance phones. There were no telephone manufacturing companies in the city of Chicago from the years 1898 to 1904 selling any telephone transmitters except the granular carbon type, except the American Bell Telephone Company were leasing another type, and during this period all transmitters manufactured and sold in the

215 city of Chicago by the Western trade other than the Bell telephones were the granular carbon type, and were generally designated as long distance telephones, and were used in

exchanges for both local and long distance communications. During this period the Belle Telephone Company manufactured and put in use the improved form of transmitter known as the "solid back" and they claimed it as an improvement over the Blake, and charged an extra rate for it. As far back as 1894, the Chicago Telephone Company itself claimed to the public that the solid back, the granular form of transmitter was superior to and an improvement over the Blake transmitter, and telephone engineers in general agreed with that claim. From 1898 to 1904 and later, the improved granular type of telephone transmitter was generally known as long distance phones.

ARTHUR BESSEY SMITH.

Direct examination by Mr. Null:

I reside at Evanston, Illinois, and am an electrical engineer. I first began this work in the early nineties, by buying telephone parts and assembling them into complete instruments and installing them on private lines. In 1901 I graduated from the course of electrical engineering from the University of Nebraska. I have been repair man and local manager, assistant manager, wire chief and in 1905 I had charge of a course in telephone engineering in Purdue University. Since 1909 I have been in Chicago devoting my time to research and development in the telephone art, and have published various articles on the art of telephony, and have published a couple of small books, one of which is entitled, "Modern Telephony."

216 I am now connected with the Automatic Telephone Company, and have been so for the past five years. This company produce the granular carbon type of transmitter. I am familiar with the Blake transmitter, with the solid back transmitter put out by the Western Electric Company, with the granular carbon transmitter, manufactured by the Independent manufacturers. I am also familiar with some of the trade names by which the independent manufacturers have called their transmitters of the granular carbon type from 1894 to 1904. Some of these were called "Hunnings" transmitter, others were called "solid backs", others "granular carbon", others "long distance", others "gold electrode", "American Beauty" and the like. Many of the manufacturers combined the term "long distance" with the other trade designation.

Most of the instruments produced by independent manufacturers designated as long distance telephones were efficient for use in long distance, and the transmitter produced by the American electric Company is fully equal to the other transmitters which have been mentioned. There are exchanges where the automatic exchange installed the transmitters are used by subscribers indiscriminately for both local and long distance service. I have recently made a search for authority in literature on the matter of the phrase "long distance telephone" as applied to the telephone instruments during the time from 1895 to 1904, and the following is the result of my investigations:

The Kellogg Switchboard & Supply Company in an advertisement January, 1903, stated:

"That is why the Kellogg transmitter is guaranteed better than the Bell solid back."

Telephony, Vol. 5, No. 1, advertising page No. 4.

217 The Standard Telephone & Electric Company in an advertisement January, 1903, stated:

"Standard Telephones for exchange and long distance work are unequalled."

Telephony, Vol. 5, No. 1, advertising Page No. 19.

The Vought-Berger Company in an advertisement October, 1903, speaking of their "new series or bridging telephone No. 45" said:

"No. 45 is equipped as follows, Bell type solid back long distance transmitter mounted on hollow adjustable arm with double concealed cord; best bi-polar receiver concealed cord connections; silk wound long distance induction coil;"

Sound waves, Volume 6, No. 5, Page 45.

The Swedish American Telephone Company in an advertisement October, 1903, said:

"Long distance talking sets * * * built with especial reference to long distance service."

Sound Waves, Volume 6, No. 5, Page 26.

Standard Telephone & Electric Company in an advertisement December, 1903, said:

"Standard No. 121 solid back long distance transmitter."

Sound Waves, Volume 7, No. 1, advertising Page III.

Acme Electric Company in an advertisement January 1904, said:
"This phone is equipped with our No. 2 long distance transmitter."

Telephony, Volume 7, No. 1, advertising page 18.

Kellogg Switchboard & Supply Company advertisement January, 1904, said:

"Kellogg Switchboard & Supply Company has given independent telephone * * * VIII. The first improvement in transmission apparatus so as to equip all telephones, whether magneto call or common battery, to the long distance service."

218 Telephony, Vol. 7, No. 1, Page 50.

Dean Electric Company in an advertisement November, 1904, said:

"This common battery wall set is provided with the Dean long distance transmitter and receiver and is wired with the most efficient talking circuit ever designed."

Telephony, Vol. 8, No. 5, advertising Page 13.

Central Electric Company, in an advertisement November, 1904, said:

"Our transmitters are the solid back type, clear and distinct."

Telephony, Vol. 8, No. 5, advertising page 32.

Sterling Electric Company in an advertisement November, 1904, said:

"No. OO Transmitter for long distance work."

Telephony, Vol. 8, No. 5, advertising Page 47.

The Gemmill Telephone & Mfg. Co. in an advertisement November 1904, said:

"Reversed solid back transmitter greatest volume clearness quality.
* * * You can hear better with our long distance loud speaking receiver with no exposed metal parts and permanent adjustment."

Telephony, Vol. 8, No. 5, advertising Page 87.

Cross-examination by Mr. Hitchcock:

The automatic electric company began to manufacture their present type and place them on the market about the year 1901 or '2. I do not know of the company having made any transmitter except the granular carbon type, and this transmitter has always been very efficient for both local and long distance work.

219 I do not remember the exact date when the granular carbon transmitter was first put on the market in Chicago, but I remember that as early as 1896 a more or less crude form of granular carbon transmitter, which was better than the Blake under certain conditions, was obtainable, but which did not compare in efficiency under all conditions with transmitters produced later. I am under the impression that the Kellogg Switchboard & Supply Company sold the first granular carbon transmitter before 1900, and that this transmitter at that time was used for both local and long distance service, and if in 1900 one had purchased a Kellogg Switchboard and Supply Company phone without any further designation he would have obtained a transmitter suitable for long distance purposes.

If in 1903 I had bought a telephone transmitter offered for sale by any reputable independent company in Chicago without any general specification as to long distance or otherwise, he would have obtained a transmitter of the granular carbon type, suitable for both long distance and local service.

As early as 1903 the art of telephony had been so developed that the Blake transmitter had become obsolete, and in the installation of telephone exchanges in cities of between five and ten thousand people, no other transmitter would have been considered other than some form of improved solid back or granular carbon. I do not know of any telephone exchange in the United States installed subsequent to 1900 in which any other form of transmitter was installed and supplied the same form of improvement then known as the solid back or granular carbon form.

220 J. O. STOCKWELL.

Direct examination by Mr. Null:

I reside in Chicago, and am a telephone expert, employed by the Chicago Telephone Company, with which company, I have been for about fifteen years, and have been with other Bell Companies con-

tinuously for thirty years. The Blake transmitter was the first practical transmitter gotten up and I first became acquainted with it in 1884. It was used extensively until about 1897, at which time they began to use the solid back. Up to that time the so-called "solid back" were only supplied to a few parties wanting a better class or louder instrument, for which a higher rate was charged. By the introduction of the measured service in Chicago in 1900 they soon had a great deal of the solid back instruments in use, but they continued the use of the Blake transmitters up to 1906. And at that time the courts ruled that under their franchise they had no right to charge any more for solid back than for Blake service, and for business reasons the company discontinued the Blake service.

The Chicago company in their directory indicated their subscribers who had a solid back instrument by a star, and a note at the bottom of the page saying that subscribers designated with a star had this improved service. I know of one exchange at St. Joe, Missouri, which as late as 1905 still had a number of Blake transmitters in use.

221 Cross-examination:

During the year 1901 the Chicago Telephone Company ceased to put the note of designation at the foot of its directory on each page concerning improved transmitters. I couldn't fix a positive date when the Chicago Telephone ceased to install Blake Transmitters. I do not know of any exchange installed by a Bell company where the number of stations in excess of 500 in its western territory where the Blake type of transmitter was used in place of a solid back subsequent to 1900. In the engineer's service we have code numbers to distinguish the different apparatus. I think the solid back is sort of a nick-name for the instrument. We had an instrument that operated with granular carbon previous to the solid back, and they usually called it the long distance instrument. I can't tell positively when this solid back superceded what we called the long distance transmitter, but we had solid backs in service at the time of the Chicago World's Fair in 1893.

Evidence Submitted on Behalf of Defendant.

HIRAM D. CURIER.

Direct examination by Mr. Hitchcock:

I live in Chicago, Illinois, and am chief engineer of the Kellogg Switchboard & Supply Company. I first entered the telephone business in the employ in the supply department of the Chicago Telephone Company in 1897. I served there for one year and was then transferred to the engineering department and have been engaged in the engineering work designing and constructing and operating telephone apparatus since 1898. In 1901 I worked for the 222 Maryland Telephone and Telegraph company in manufacturing and installing apparatus. In the latter part of 1901,

I entered the employ of the Century Telephone Construction Company in Cleveland, Ohio, and was employed in designing transmitters. Six months after I moved to Chicago and took charge of the Eureka Electric Company plant. This company manufactured a complete line of telephone apparatus. In 1903, I went to work for the Western Electric Company and installed telephone exchanges in Kansas City and St. Louis.

I was next employed as chief engineer of the Duplex Metals Company. I was next with the Western Electric Company in a partial capacity and in September 1912 I went to the Kellogg Switchboard & Supply Company and had charge of experimental engineering. Since April 1914, I have been chief engineer of such company. My duties consist in the designing of telephone apparatus and detail specification work. Relative to the exchanges this company installs, I am familiar with the telephone instrument known as the Blake transmitter manufactured under patent of Bell, Edison and Berliner. I also am acquainted with the solid back transmitter. The Blake transmitter was a standard instrument adopted by the Bell Telephone companies and used in magneto exchanges, and I first became intimately acquainted with it in 1897. This transmitter was not applicable to common battery service wherein all the battery energy is located at the central office instead of substation instruments. The use of the Blake transmitter as a standard instrument was abandoned by the Chicago Telephone Company in 1898, at which time the

223 first common battery exchanges were installed in Chicago.

The system then installed was adopted as a standard and the solid back transmitter was considered as a part of this standard common practice. The solid back type of transmitter using a granular carbon type of transmitter or "Hunning" type was available in 1901 from the following companies that I know of: Kellogg Switchboard & Supply Company, Stromberg-Carlson Manufacturing Company, Century Construction Company, Williams Abbott Electric Company and Western Electrical Company. The Blake transmitter was an instrument manufactured by the Bell Telephone Company and was not for sale but was licensed for use and a rental paid for same by the connecting companies.

In 1904 the States of Nebraska, Minnesota, Iowa, North and South Dakota, were supplied with telephone apparatus by Chicago manufacturers, who all had for sale a granular carbon solid back transmitter. None of them had any transmitter of the type of the Blake transmitter for sale. In the year 1904 the transmitters on the market were sold for both local and long distance purposes. The local battery system in use at that time would not permit of the use of a transmitter of the Blake design, it being considered as obsolete by all engineers.

Cross-examination by Mr. Null:

The Chicago Telephone Company was a subsidiary of the American Bell Telephone Company, and it did not use any equipment other than that manufactured by the Western Telephone Company,

which was a subsidiary Bell Company. It is my remembrance that the number of Blake transmitters in use by the Chicago Telephone

Company in 1897 were in excess of the solid back transmitters.

224 The Blake transmitter was not an efficient instrument for local use as compared with the solid back transmitter. Since 1898, I have had no experience with operations of the Blake transmitter in actual use because it was abandoned by the telephone art and no engineer desiring to attain efficiency would contemplate its use. By 1900 I would estimate that ninety-eight per cent of the transmitters in use in Chicago were of the solid back type.

While I was employed by the Chicago Telephone Company in installing new appliances there was no distinction made between the telephone designed for local use and those designed for long distance use. From 1898 to the present time every manufacturer in the United States has made a long distance transmitter but these have in no manner been distinguished from transmitters designed for local use. The manufacturers designated these instruments as long distance *purposes*, but the same transmitters were installed on telephones used for house systems only. The manufacturers advertised that their transmitters could be used for long distance work, for the purpose of enlightening the subscribers that the instruments could be used for long distance purposes if necessary. The term "long distance" was a phrase coined by the Bell Telephone Company in an endeavor to detract from the mind of the subscriber the ability of the independent operating to give service to a distant point. The term "long distance" means to a subscriber remote points of communication because this phrase has been coined and is used to signify places far removed from each other. In all operative companies, if a subscriber desires to talk out of town they ask for long distance. The term "long distance" does not have any sig-

225 nificance with reference to whether the instrument is to be used in the toll line service or local exchange service for the reason that all telephones are supposed to be available for long distance service and as to whether the station can be used for long distance service depends upon the contract between the subscriber and the company. In our business we sell telephones where they are used for local house service only, and are never connected with a toll line, and we state that they are not long distance telephones, but the reason is not in the design of the instrument, but is in the use to which the instrument is put.

Each telephone that each manufacturer in the telephone field today produces and has produced since 1900 and known as a standard substantial instrument may be used for long distance purposes if it is put to that use. A telephone may be considered as a long distance telephone if it is designated to give long distance services. So far as the difference of construction is concerned, they are all constructed alike. To illustrate, if we install a telephone exchange and sell a man a thousand telephones they may all be used for long distance purposes, but if he desires to restrict the use of a portion of these telephones for certain kinds of service, he would not call them long distance telephones, although they were constructed iden-

tically alike. Since the abandonment of the Blake transmitter, subscribers desiring access to the toll lines have not been supplied with a special instrument for toll line use. Such occurrence did take place with the Bell Company prior to that time. There 226 some instruments placed at public pay stations prior to 1900 which were of the granular carbon style, known as the "solid back transmitter." The reason that Blake transmitters were left in use at stations which did not use a long distance service was because of the enormous investment in those old style of instruments. This is true only of the Bell Telephone Company. With the independent telephone companies, the granular carbon transmitter known as the Hunnings type was used at all stations whether long distance or not.

The phrase "long distance transmitter" was used to distinguish the stations that used long distance service, and as far as the economics of business permitted, these solid back instruments were installed throughout the system, and this was accomplished in Chicago in its entirety in 1900. The only telephone instruments with the inscription "long distance telephone" that I know of were made by the Bell Company, but its use was abandoned by the Chicago Telephone Company in 1900. I do not recall any such name plate on the Eurika Telephone. Some companies in the use of the term "long distance telephones" used the term only to prey upon the gullibility of the people, and not to define the efficiency of the instrument, because such instruments did differ in any regard from other telephones available.

Since I entered the telephone field in 1897, all the manufacturing companies which I have previously enumerated had the solid back transmitters only available, and they were furnished for both common battery and local battery work regardless of whether the instruments were to be used for long distance or not. For ex-

227 ample, there are any number of cases in the United States where exchange systems have been installed and the communications between subscribers has been limited to the corporate limits of the town, yet each instrument in the town was serviceable for long distance use, and the only reason it wasn't used for such purpose was the fact that the telephone company did not have toll lines.

A common battery exchange means an exchange system wherein all of the battery supply is placed at the central office. A magneto system contemplates a generating machine located in the substations with a crank on it, which the subscriber turns, thereby generating the necessary current. In a local battery system, the talking battery is located at the substations. In common battery systems, the talking battery is located at the central office.

Redirect examination by Mr. Hitchcock:

Since 1900 I have been connected with the larger representative manufacturers of telephone instruments, and I have never known of an instance where one telephone was sold for local town service

and another one for out of town service, or so-called, long distance service.

ALVA J. CARTER.

Direct examination by Mr. Hitchcock:

I live in Chicago and am sales manager for the Kellogg Switchboard and Supply Company. In the year 1896, I entered the telephone business as a lineman and continued in this employ until 1900. From 1900 to 1904, I was engaged in operating a 228 telephone exchange system in Corydon, Iowa, Seymour, Iowa and Ida Grove, Iowa. From 1904 to 1912, I was selling telephone apparatus for the Monarch Telephone Manufacturing Company, and from 1912 to the present time, I have been connected with the sales department of the Kellogg Switchboard and Supply Company. During that time I have become acquainted and familiar with various types of telephone transmitters including the Blake and solid back transmitters. I have travelled in South Dakota, Minnesota, Iowa and Nebraska, in the capacity of traveling telephone salesman and am familiar with the types of equipment used, and to my knowledge, the types of transmitters most generally used are those of the granular type. I do not know of any telephone manufacturing company since 1900 that has placed on the market two forms of telephone transmitters, one to be used for local exchange or within towns or villages, and the other for long distance or communications between towns and villages. I know of no dealer or manufacturer putting in a telephone system in cities of from five to ten thousand people, who would consider installing more than one kind of a telephone, which was to be used for both local and long distance work. I know of no dealer or manufacturer who since 1900 has put upon the market for sale any type of transmitter other than that known as the solid back or granular carbon transmitter.

229 Cross-examination by Mr. Null:

I began travelling for the Monarch Telephone Manufacturing Company and the Kellogg Switchboard & Supply Company in 1904. I have not seen any telephone instruments offered on the market which were designated on the name plate as "long distance telephones."

JOSEPH B. EDWARDS.

Direct examination by Mr. Hitchcock:

I am vice president and general manager of the Kellogg Switchboard & Supply Company. The company manufactures, sells and distributes telephone apparatus systems. From 1891 to 1900, I was connected with the Western Electric Company, Manufacturers. Since 1901, I have been with the Kellogg Switchboard & Supply Company, and directly connected with the manufacture of transmitters for the Western Electric Company until about January 1st,

1893. In April or May, 1893, I assumed the position of Superintendent of the Western Electric Shops at Antwerp, Belgium, and they were engaged exclusively in the manufacture and sale of telephone apparatus. Since 1893 I have had to do intimately with transmitters for the above company. In 1904, I was familiar with the various types of transmitters and telephone equipment used in the construction and operation of telephone plants, in the territory of United States west of Chicago, including the states of Nebraska, Iowa, Minnesota, North and South Dakota. I did not in the year 1904, nor have I at any time had any knowledge of the term "long distance" being applied to designate a special type of transmitter.

In 1893, the Western Electric Company manufactured a 230 majority of Hunnings type of granular carbon transmitter.

The manufacturer of Blake transmitters being discontinued from October 1901 up to the time I entered the employ of the Kellogg Switchboard & Supply Company, we manufactured and sold only the Hunnings type of transmitters. There has never been at any time in our business any distinction made of transmitters for purely local or toll and long distance transmission between various towns. That is, we manufactured, sold and delivered only the Hunnings type of transmitter as one type for all purposes.

Cross-examination by Mr. Null:

I do not remember when the regular manufacture of the solid back transmitter was begun, but the Western Electric Company was manufacturing this transmitter in large quantities as regular production during the first part of 1893. During the time I worked for the Western Electric Company, beginning in 1895, solid back transmitters were used in telephones designated as long distance and also in telephones known as private or local telephones.

The term "equipped with long distance instruments" as used in the Chicago Telephone Company's directory dated June 1, 1894, I presume has reference to the more modern type of transmitters as they were replacing at that time the earlier type of Blake transmitter with the Hunnings or granular carbon, and I would say that this note means the Hunnings type of transmitter is distinct from the Blake transmitter. The common battery system came into use in 1898. The Blake type of instrument has not been

231 used in connection with the common battery system for the reason that this type of transmitter has become obsolete before the general use of common battery system. The manufacture of Blake transmitters was discontinued by 1898. All transmitters that I know of manufactured by independent manufacturers are designated as long distance transmitters. Independent manufacturers sometimes designated the Hunnings type as a long distance instrument.

Redirect examination by Mr. Hitchcock:

I do not recall that any distinction was made by the Chicago Telephone Company in its directory as late as 1900 between the various telephone instruments furnished to its subscribers. I can-

not tell the particular date when the Blake transmitter was entirely abandoned, but we have never come in competition with this type since 1901.

There would not have been any difference in the meaning of the language used by the various telephone companies if they had stated in their directories that all telephones are of modern equipment and style, and that all subscribers' telephones are telephones of modern equipment and style, instead of designating them as "long distance instruments." In 1899, the term "modern style of telephone equipment" would mean in every sense the same as to use the term "long distance instrument." As far as the manufacture and general sale of transmitters is concerned, the Blake type of transmitter *has* gone out of use before the common battery type of service had come in general use.

232 Recross-examination by Mr. Null:

The Blake transmitter has not been used to my knowledge with the common battery, but the solid back transmitter has been used with the local battery.

FRED B. ELCE.

Direct examination by Mr. Miller:

My name is F. B. Elce, and I live at Parker, South Dakota. I am the grantee named in the ordinance passed by the City of Mitchell on the 11th day of May, 1898, and known as Ordinance No. 135, the title of which is as follows: "An ordinance granting to F. B. Elce, his associates, heirs and assigns, the use of the streets, alleys and public grounds of the City of Mitchell, South Dakota, for the erection and maintenance of a public telephone system." Under this ordinance, I constructed a local system in the City of Mitchell, and operated until 1904, when I sold it to the Dakota Central Telephone Lines. At the time I sold the exchange I had different kinds of transmitters and phones. The first year I came in, I used the Victor, and kept buying different phones. I think I had a few American and Eureka and Kellogg phones. That is principally what I was using when I sold out. I had about four hundred phones at the time I sold out, and I had connection with long distance telephones after the first year. At the time I sold out I was connected with the Dakota Central Telephone Lines. They had headquarters at Aberdeen, and Mr. Zeitlow was at that time president of the company.

233 The telephone instruments I had in my local exchange at the time I sold out were used in talking over long distance lines when connected up. I could connect up with long distance lines to Sioux City, Sioux Falls and some to Minneapolis. There were not many calls at that time to Minneapolis, but there were some from travelling men. I had a little trouble in talking over long distance lines at the time I sold out depending on the distance and condition of the lines and the weather. The telephone instru-

ments that I had installed in my local exchange were the latest instruments used at that time. I do more or less talking over long distance telephones now. It is hard to tell about any difference in the ability to talk over the long distance with the present instrument and the instruments I had when I sold out to the Dakota Central Telephone Lines. The outside construction of the telephones lines has a good deal to do with the efficiency of the telephone. This construction at the time I sold out was not in good condition. We didn't have any metallic circuits and no copper lines. The long distance talk passed entirely over iron wires and grounded lines. In talking over the long distance line at that time it was my custom to connect the caller from his station to the long distance lines and he would then talk from his own local telephone. I did not have any Blake transmitters installed in my telephone exchange in Mitchell any time that I owned it. The transmitters I had in use in my local exchange were suitable for work over long distance lines at that time, and that is one of the purposes I purchased them for.

234 Cross-examination by Mr. Null:

The Kellogg instruments that I bought were manufactured by the Kellogg Company of Chicago. The transmitter used on the Kellogg instrument that I had at that time was called the solid back transmitter. The carbon was granulated and contained in a little disk. At the time I was operating this exchange we had some special instruments to do long distance work. I won't say whether these instruments were call- the Bell or the Western Electric, but they were generally known as the Bell instrument. I supplied none of those to my subscribers, but used them only in telephone booths. The Bell company furnished them and we had to pay rental on them. They were not for sale and they were generally supposed to be better for long distance work. Prior to the time I sold out, I was familiar with the catalogue and advertising matter of telephone manufacturers and I do not recall that any of the telephones I bought shortly before I sold out were called "long distance telephones." When I sold out, I had no Blake telephones and there were only two in booths, one at the Mitchell House and one at the Widman, and those were the big long-distance telephones.

When I first installed the exchange in 1898, I used the Victor telephones, manufactured by the Victor Manufacturing Company. It had a granulated carbon disk at that time, and was equipped

with a felt pad. I only used these transmitters the first 235 year I was here. I never bought any toward the last. The later phones that I had when I sold out did not bother me any. The Dakota Central Telephone Lines built the toll line to Mitchell in the spring of the year that I built, in 1898. They came in from the east—from Salem to Mitchell, and also built from Mitchell to Chamberlain, the next year and built south and met the Bell Company at Scotland, and built north to Woonsocket, and the years following that they built out in different directions, and this was done within a few years after I built my exchange.

I had had seven years of experience in the telephone business prior to that, and I had some customers who used the toll lines considerably, but I did not supply them with special instruments for that use. They had the same phones other people used. If they were any better it was because they were built later. In talking to Minneapolis, it frequently occurred that it was necessary for some operator along the line to repeat the conversation. That happened quite commonly in using the long distance.

Redirect examination:

At the present time conversations more or less have to be repeated by operators along the line in talking over long distances. The main difficulty we had talking over long distance at that time was because of the poor outside construction. Telephone instruments that I mentioned as placed in booths were long distance booths, and were operated by the people who owned and conducted the long distance lines into Mitchell at that time. I think half of the phones I had at the time I sold out were metallic solid back transmitters.

236 At the time I sold out and sometime before that, generally speaking, I put in a Kellogg phone, which was a solid back granulated carbon phone. I kept buying the best instruments that I could buy from the time I started in Mitchell until I sold out. I considered the instruments I bought from the Kellogg people as the best instrument I had. I could not say that the solid back transmitters, I put in at that time were known in the trade as "long distance transmitters."

GEORGE E. FOSTER.

Direct examination by Mr. Miller:

I live in Mitchell, South Dakota, where I have lived since the spring of 1897. I was register of the United States land office in 1904, at Mitchell, and was alderman from the third ward. I remember the passage of Ordinance No. 174 entitled, "An Ordinance to grant permission to the Dakota Central Telephone Lines, their successors or assigns, the right to erect poles and fixtures and to string wires for the purpose of operating a long distance system within and through the city of Mitchell, South Dakota. I also remember the passage of Ordinance No. 180 with the same title. I voted for the ordinances. At the time Ordinance No. 174 which was passed March 21, 1904, and Ordinance No. 180 passed June 7, 1904, I did not know anything about the various telephone instruments in use. I was not familiar with the various makes of telephone transmitters. I had never heard of telephone transmitters called the solid back transmitter, and I knew nothing about a telephone transmitter at that time which was sometimes called the "long distance transmitter," and I did not know that there was a telephone transmitter on the market called the "solid back" sometimes, and at others times called the "long distance transmitter" in the trade.

Q. What do you understand by "long distance telephone"?

Objected to as immaterial and incompetent.

Objection sustained, exception allowed.

A. My understanding of a long distance telephone was to connect different towns in different parts of the state so as to talk with people outside of Mitchell.

Q. That is what you understood by the term "long distance telephone" at the time of the passage of this ordinance?

Objected to as incompetent and immaterial and could not be received to interpret the ordinance.

Objection sustained. Exception allowed.

A. That is what I understood.

At the time of the passage of these two ordinances in question I had never heard of any distinction between the telephone instruments used in local exchanges and in long distance lines.

Cross-examination by Mr. Null:

When I was in the land office at Mitchell, we frequently called and talked over the long distance lines, but never went to a telephone booth.

Redirect examination:

The telephone we had in our office was the same as the telephones in general use in the city. We first had a wall telephone and next a desk telephone.

Recross-examination:

The wall telephone was contained in a large box.

238 A. J. KINGS.

Direct examination by Mr. Miller:

My name is A. J. Kings and I live at Mitchell, South Dakota, and have lived there since the spring of 1883. In 1904 I was a member of the City Council of the City of Mitchell, and I was a member of the City Council that passed Ordinance No. 180 of the city. I voted for that ordinance. At the time this ordinance was passed, I was not familiar with the various makes and kinds of telephone instruments in use, nor was I familiar with the trade names of any of the instruments, and I had never heard of a telephone transmitter called a "solid back" or "long distance transmitter."

Q. You may state what your understanding is of the term "long distance"?

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

A. I understand it as a line running from different towns and connecting the different towns in the country.

Q. Did you so understand the term "long distance telephone" at the time this ordinance was passed?

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

A. Yes, as connecting different towns around.

Q. You may state whether or not at the time this ordinance No. 180 was passed you intended as a member of the City Council to grant a franchise to the Dakota Central Telephone Lines for the purpose of owning and operating a local exchange in the City of Mitchell, South Dakota.

239 Objected to as incompetent and immaterial for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

A. I did not understand it as a local exchange. We already had one.

I think it was discussed frequently, we didn't want any more local exchanges.

Cross-examination:

I was a contractor and builder at that time. I did not have a telephone in my office, but had one at the residence, and occasionally talked over long distance. Sometime I would talk from my residence and sometimes from the booth in the local telephone office.

J. E. WELLS.

Direct examination:

My name is J. E. Wells, and I live at Mitchell, South Dakota, where I have resided since 1880. I have been in the abstract and insurance business since 1895. In 1904 I was a member of the city council of the city, and I can remember the passage of Ordinance No. 180, and I voted for the passage of such ordinance. At that time I was not familiar with the various makes of telephone instruments in use at the time this ordinance was put up for passage. I had never heard of a telephone instrument called the "solid back transmitter" and sometimes called the "long distance transmitter."

Q. State what your understanding of the term "long distance" is?

240 Objected to as incompetent and immaterial, and no foundation laid for it. Objection was sustained. Exception allowed.

A. It is a telephone connection from one town to another.

Q. That was your understanding of that term "long distance telephone" at the time these ordinances were passed, was it?

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

A. That is the way I remember it.

Q. As far as you remember, Mr. Wells, did you intend at the time you voted for these ordinances to grant to the Dakota Central

Telephone Lines a franchise for the purpose of owning and operating a local telephone system or exchange in the City of Mitchell?

Objected to as immaterial and incompetent and cannot be received for inferring the interpretation of ordinances. Objection sustained. Exception allowed.

A. It wasn't my idea at the time.

Q. Your understanding was that they were simply getting a long distance franchise to connect the city with places outside the city by telephone.

Objected to as incompetent, immaterial and cannot be received for the purpose of inferring the interpretation of the ordinance.

Answer: Yes, sir.

241 Cross-examination by Mr. Null:

I had a telephone at my place of business at that time and used it frequently for long distance conversations. I do not remember the general make up of the phone, only that it was a phone used at that time. It had a larger box than the one I had at the residence. I do not remember what the reason was for passing the second ordinance.

Redirect examination:

We had four wards in the city at that time and they were represented by two aldermen in each ward, and there were, therefore, eight members on the city council at that time.

A. J. CURTIS.

Direct examination by Mr. Miller:

My name is A. J. Curtis. I live at Mitchell, South Dakota, and have lived here since 1892. In 1904 I was an alderman and member of the city council, and I remember the passage of ordinance No. 174 and ordinance No. 180. At the time these ordinances were passed, I was not familiar with the various kinds of telephone instruments in use here for local or long distance work. Neither was I familiar with the telephone transmitter called the "solid back transmitter", and sometimes called "long distance transmitter." I did not know that there was any difference in the transmitters used for local work and transmitters used for long distance work. Neither was I familiar with the transmitter called the Blake transmitter.

Q. What do you understand by the term "long distance telephone?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

A. Long distance would be to telephone to places outside of the city—to other towns.

Q. Was that the understanding you had of the term "long distance" at the time these ordinances were passed?

Objected to as immaterial and incompetent for the purpose of interpreting the ordinance.

A. Yes sir, that was my understanding at that time that it was for long distances to connect with other towns and people at a long distance.

I think I voted for the passage of ordinance No. 180.

Q. Did you intend as a member of the city council in voting for the passage of Ordinance No. 180 to grant to the Dakota Central Telephone Company the right and privilege of owning and operating a local telephone system or exchange within the City of Mitchell, South Dakota?

Objected to as immaterial and incompetent and inadmissible for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

A. I didn't vote with the understanding that they were to have any local telephone. It was long distance. What the ordinance called for was long distance and communication outside of the city.

Cross-examination by Mr. Null:

I was in the livery business at that time. I had a telephone at my place of business and also at my residence. The one at the residence was the same as at my place of business. I used the toll lines and my patrons used it, but I don't remember very much about it.

GEORGE A. SILSBY.

Direct examination:

My name is George A. Silsby. I live at Mitchell, South Dakota, and have been in Mitchell between thirty three and thirty four years. In 1904 I was Mayor of the City of Mitchell. I remember the passage of Ordinance No. 180 in 1904, which as Mayor I signed. At the time I was not familiar with the various telephone instruments that were in general use, the technical construction, nor their names, and I was not familiar at that time with any of the instruments, nor the name they went by. I didn't know whether they were called "long distance transmitters" or "solid back" or "Blake transmitters" or anything else. At the time I signed these ordinances my best recollection now is that I did not know that Dakota Central Telephone lines had purchased or were negotiating for the purchase of a local telephone system or exchange from F. B. Elce. Neither do I know that the other members of the council had any knowledge of such proposition at that time.

Q. Mr. Silsby, what do you understand by the term "long distance telephone?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

A. The facilities for connecting between points or between different towns and cities.

- 244 Q. Did you understand that if I phoned from the office up to your office at the Elks that that would be a long distance telephone or do you mean to say the points should be in different localities or towns?

Objected to as immaterial and no proper foundation has been laid for it. Objection sustained. Exception allowed.

A. Generally speaking, I should understand it as between different towns.

Q. Was that the understanding you had of "long distance telephones" at the time you signed these two ordinances I have heretofore mentioned?

Objected to as incompetent and immaterial, and no proper foundation laid for it. Objection sustained. Exception allowed.

A. I think it was. That was my understanding at that time.

Q. Then as far as you know that was the understanding of the other members of the council, was it not?

Objected to as immaterial and incompetent and no proper foundation laid for it.

A. I think that that was the sense of the council.

Q. In the passing of these ordinances the city council at the time as you understood it, did not intend to grant a franchise to the Dakota Central Telephone Lines to own and operate a local telephone system or exchange in the city.

245 Objected to as immaterial and incompetent and cannot be received for the varying of the interpretation of the ordinance.

A. No sir.

LAURITZ MILLER,
EDWARD E. WAGNER,
Attorneys and Solicitors for Defendant.

(Endorsed:) Filed April 1, 1916. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

In the District Court of the United States, District of South Dakota,
Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Com-
plainant,
vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Certificate of Judge.

UNITED STATES OF AMERICA,
District of South Dakota,
Southern Division, ss:

I, Wilbur F. Booth, Judge of said Court, sitting in the above
entitled suit by appointment in lieu of Hon. Jas. D. Elliott, Judge
of the United States District Court for the District of South Dakota,
disqualified, hereby certify that the foregoing statement of evi-
dence contains all of the material evidence received upon the trial
of said case, and is a true, complete and properly prepared statement
of evidence offered or received on behalf of either party to said suit,
and I hereby allow and approve the same.

246 Dated this 6th day of May, A. D., 1916.

WILBUR F. BOOTH,
United States District Judge.

(Endorsed:) #5. S. D. Equity—Dakota Central Tel. Co. v.
City of Mitchell—Statement of Evidence—Filed May 8, 1916.
Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And, to-wit, on the 4th day of April, A. D. 1916, there was
filed in the office of the clerk of said court Assignment of Errors;
which said Assignment of Errors is in words and figures the fol-
lowing, to-wit:

247 In the District Court of the United States, District of South
Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Com-
plainant,
vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

'Assignment of Errors.'

Now comes the defendant in the above entitled cause and files
the following assignment of errors upon which it will rely upon its
prosecution of the appeal in the above entitled cause, from the decree
made by this Honorable Court on the 14th day of September, A.
D., 1915.

First.

That the United States District Court for the District of South Dakota erred in taking and entertaining jurisdiction of this suit; that said Court did not have jurisdiction to hear and determine the same for the following reasons:

(a.) Because the Resolution of the defendant City of March 17th, 1913, the enforcement of which plaintiff seeks by this suit to enjoin, is not a law and did not, and does not have the force or effect of a law of a state, impairing the obligations of a contract, within the meaning of Section 10, Article 1, of the Constitution of the United States.

(b.) The Supreme Court of the State of South Dakota has considered and decided that a resolution of a city council in said state, is not of equal dignity with and does not operate as a repeal of, an ordinance enacted by a city council, and such decision is conclusive of this question and binding upon the Federal Courts.

248 The Resolution herein referred to is as follows:

"Telephone Resolution.

Whereas, the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the erection and Maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and,

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas, the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305, of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local telephone system or exchange in the City of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and,

Whereas, the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota; and

249 Now therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the

same are hereby terminated from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of said resolution and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and

description used by it in the construction, maintenance
250 and operation of its local telephone exchange or system in
the City of Mitchell, South Dakota, as herein required, then
the City Council of the City of Mitchell, South Dakota, will take
such steps as may be necessary to secure the immediate removal of
said poles, wires, cables, fixtures and apparatus from the streets,
avenues, alleys and public grounds of the City of Mitchell, South
Dakota; and,

Be it further resolved that a copy of this resolution be served upon
said Dakota Central Telephone Company, by sending a copy of
same by registered mail to J. L. W. Zeitlow, the President of said
Company at Aberdeen, South Dakota, and that the City Auditor
of the City of Mitchell, South Dakota, is hereby directed to forth-
with mail a copy of this resolution by registered mail to said J.
L. W. Zeitlow in accordance herewith; and

Be it further resolved that the mailing of a copy of this resolu-
tion by the City Auditor to the President of said Company as herein
required, and the receipt of such copy by said president shall con-
stitute notice to said Dakota Central Telephone Company of the
contents of this resolution and of the intention of the City Council,
of the City of Mitchell, South Dakota, relative to the matter herein
contained.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,
City Auditor."

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Second.

The District Court erred in adjudging and entering its decree
that plaintiff is and since June 7th, 1914, has been rightfully and

lawfully maintaining and operating under the rights and privileges granted to the Dakota Central Telephone Lines, (Inc.) by Ordinance No. 180 of the defendant City, two separate and distinct telephone exchanges or systems, one for local and one for long distance or toll lines, or that it acquired any right whatsoever to maintain and operate a local telephone exchange or system within said City under said Ordinance No. 180, for the following reasons:

(a). The sole right and authority of plaintiff to maintain and operate a local telephone exchange or line within the said defendant City was acquired by and through Ordinance No. 135, of said City, "Granting to F. B. Elce, his Associates, Heirs and Assigns the use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System." Passed by the City Council May 11th, 1898; that the franchise and all rights granted by said Ordinance expired by the terms thereof May 11th, 1913.

(b). That said Ordinance No. 180 did not grant to the Dakota Central Telephone Lines (Inc.) under which plaintiff claims, does not and never did authorize the Dakota Central Telephone Lines (Inc.), its successors or assigns, the right to maintain and operate a local telephone exchange within said City.

(c). The plaintiff herein was and is precluded and estopped from maintaining this suit, because of the adjudication by the Supreme Court of the State of South Dakota, in the case of 252 City of Mitchell, et al., vs. Dakota Central Telephone Company, decided May 24th, 1910; 25 S. D. 409, (127 N. W. 582) wherein said Court considered said Ordinance and decided that said Ordinance No. 180 did not repeal Ordinance No. 135, and that said Ordinance No. 135 was for a local telephone system within the defendant City, and that said Ordinance No. 180 only authorized a long distance telephone system within and through said City, and that said construction and decision by said State Court is res adjudicata and conclusive of this question against plaintiff, and it cannot be heard upon the same question in this suit. Said Ordinance No. 180 is as follows:

"An ordinance to grant permission to the Dakota Central Telephone Lines, (Inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota.

Be it ordained by the city council of the city of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Lines, (Inc.) their successors or assigns to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception however, not to prohibit the crossing of Main, Park Avenue, Fourth and Fifth Streets, at right angles, where it is necessary, and maintaining the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of the

253 City of Mitchell, and the public in general, facilities to communicate with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell, reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect from and after the date of its passage and approval.

Passed June 6th, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, *Mayor.*
J. G. MARKHAM, *Auditor.*"

254 (d). It affirmatively appears from the record and is undisputed that notwithstanding said ordinance No. 180, plaintiff continued to operate and maintain its local telephone exchange within the defendant city from the date of the passage of said Ordinance No. 180, to-wit: June 7th, 1904, under the authority of said Ordinance No. 135 and paid the gross earnings tax imposed thereby, and otherwise complied therewith until the expiration of all of the rights granted thereby, to-wit: May 11th, 1913, and the plaintiff thereby placed a practical construction upon said ordinance, as well as Ordinance No. 180, to the effect that said Ordinance No. 135 granted the right to own and maintain only a local telephone exchange within the defendant City, and that said Ordinance No. 180 granted authority only to maintain and operate a long distance telephone exchange; that the interpretation of said Ordinances so adopted by plaintiff was determined by the Supreme Court of South Dakota, in the case of City of Mitchell vs. Dakota Central Telephone Company, supra, and that the rights of plaintiff under said Ordinance, and particularly No. 180 were found and conclusively determined in said action, and the same became res adjudicata of said question, and plaintiff is bound thereby and estopped from urging

the same question in this action, and Federal Courts are bound by the interpretation of said Ordinance adopted by said State Supreme Court.

255 (e) That plaintiff is precluded and estopped by the decision of said Supreme Court in the case of City of Mitchell vs. Dakota Central Telephone Company, supra from urging in this Court the repeal of said Ordinance No. 135, by the Resolution adopted by the defendant City April 10th, 1907, because:

1. Said resolution did not in effect repeal, or pretend to repeal said Ordinance No. 135, but simply granted plaintiff permission to place its wires underground when and where conditions required.

2. Said Resolution was not of equal dignity with said Ordinance No. 135 and could not operate as a repeal of said Ordinance.

3. The State Supreme Court in the case above cited, decided that said Resolution did not operate as a repeal of said Ordinance No. 135 and that decision was and is res adjudicata as against plaintiff, and plaintiff is estopped from raising that question in this action; that the decision of said Supreme Court should be respected and followed by federal Courts.

Said Resolution of April 10th, 1907 is as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors and assigns, to place, construct and maintain, through and under the streets, alleys and public grounds of said city such conduits, manholes, and cables proper and necessary for supplying to the citizens of said city and public in general, communication by telephone and other improved appliances."

256

Third.

That said District Court erred in adjudging and entering its decree that said resolution of March 17th, 1913 was and is unconstitutional and void, and impairs the obligations of a contract between the parties thereto, contained in said Ordinance No. 180, in violation of Section 10, Article 1 of the Constitution of the United States, and that it deprives plaintiff of property without due process of law, in violation of Section 1, of the Fourteenth Amendment of the Constitution of the United States, for all of the reasons stated in assignments numbered First and Second herein.

Fourth.

That said District Court erred in enjoining and restraining the defendant City, its officers, agents, attorneys and servants from interfering with the poles, telephone lines and telephone exchange now owned and operated by plaintiff in the defendant City, because such injunction unjustly interferes with the exercise of the police powers of the defendant City, and unjustly deprives it of the right to impose reasonable conditions and burdens upon the plaintiff's right to operate and maintain any local telephone exchange within said city.

Fifth.

The Court erred in admitting the testimony given by M. L. Lane, as hereinafter set out, over defendant's objection that such evidence was incompetent, irrelevant and immaterial in that it is an attempt to construe the meaning of the ordinances involved in this action by oral extrinsic evidence and that the meaning, scope and effect of such ordinance cannot be proved by such evidence. The evidence objected to as above, is as follows:

"When I first engaged in the telephone business the 'Blake Transmitter' was in use, the transmitter is that portion of the telephone which the user speaks into when using the telephone. The Blake transmitter consisted of a carbon button, a platinum point and a diaphragm and was found to be an efficient transmitter for transmitting messages a short distance, that is 20, 25 or 30 miles. This instrument was in general use in local exchanges from 1889 to about 1904 or 1905. The type of transmitter now in use is what is known as the 'long distance' transmitter or 'solid back.' This transmitter was put on the market in 1893 at which time it began to be substituted for the Blake transmitter, but this substitution did not become general until about 1896, 1897 or 1898 in the entire United States and in some localities it was in general use before that date. The solid back transmitter was first used for long distance business and as soon as its increased efficiency became generally known it was substituted for the old transmitters as rapidly as the manufacturers could produce them, both in local and long distance work. This change was made between 1896 and 1904 or 1905. At first higher rate was paid for the use of the 'solid back' transmitter than for the old type."

258

Sixth.

The Court erred in overruling the defendant's objection to the following question asked of M. L. Lane, to-wit:

"Q. With the Blake transmitter what was the custom, what was the custom with reference to the subscriber in using the toll lines with reference to the telephone from which he would talk."

This was objected to as incompetent, irrelevant and immaterial, for the reason it don't tend to prove any of the issues in this case, for the further reason that no proper foundation has been laid, and it don't appear that the defendant is in any way bound by this custom; and for the further reason that it seeks to interpret the ordinance in question, in this litigation, by oral and extrinsic evidence outside of the ordinances themselves. Objection overruled. Exception allowed.

"A. Both the representatives of the company and the subscribers, from actual experience, knew that it was impossible to carry on a satisfactory conversation for a considerable distance with this transmitter. And after installation of the solid back transmitter, the subscriber, in preference to attempting to talk through this transmitter, would come to the central office, or to such point as the

company had located one of its long distance transmitters, and use the long distance transmitter or solid back in the place of the Blake for a long distance conversation.'

Seventh.

The Court erred in overruling defendant's objection to the following question asked of the witness M. L. Lane, to-wit:

"Q. Now, this solid back transmitter you have spoken of, what was the trade name by which such instrument was generally known among the telephone people?

259 Mr. Miller: Objected to as incompetent, irrelevant and immaterial and not tending to prove any of the issues in this case and no proper foundation has been laid for it and for the further reason it don't appear that the trade name of this instrument was taken into consideration at the time of the passage of the ordinance in litigation; and for the further reason it is in no way binding on this defendant, and that it is a mere attempt to prove the meaning, scope and effect of the ordinances of the City of Mitchell involved in this litigation, by oral and extrinsic evidence outside of the said ordinances themselves, and that this is not the proper method of proving such meaning, scope and effect. Objection overruled. Exception allowed.

"A. Long distance transmitter."

Eight.

The Court erred in overruling the defendant's objection and in admitting the testimony hereinafter stated as given by Charles E. Hall over the defendant's objection that it was incompetent, irrelevant and immaterial, and for the further reason that no proper foundation has been laid and that it is not binding on the defendant; and for the further reason it is an attempt to prove the scope, meaning and effect of the ordinances involved in this litigation by oral and extrinsic evidence outside of the ordinances themselves and this is an improper method of proving such meaning, scope and effect of such ordinances. Objection overruled. Exception allowed. The evidence objected to was as follows:

260 "The early telephone instruments were equipped with magneto calls, transmitters, receivers and batteries. The Blake transmitter was in use in 1884, until June 1905, more or less; their use gradually diminished along toward 1905, when none or very few were used. The capacity as to distance of the Blake transmitter depended upon the condition and character of the line, perhaps it was not over 50 or 75 miles over good iron lines. Long distance lines were generally constructed after 1894, and copper wire came into use in 1889, which carry messages longer distances than the iron wire. The 'solid back' transmitter did not come into extended use until about 1901 or 1902. They were first introduced in toll line business in 1893 and 1894. Prior to the time when the

solid back came into general use, the subscriber had difficulty in talking up to 100 or more miles and he would generally go to the central office or long distance to talk, but after the solid back transmitter had been furnished, the subscriber was generally able to talk over long distance from his office.

The subscribers of the Iowa Telephone Company prior to 1904, were supplied with the 'solid back' or long distance transmitters as rapidly as the transmitters could be secured, and the rental charges for these were generally greater than for the Blake transmitters. During the time from 1893 to 1904 the 'solid back transmitter' went under the trade name of 'long distance telephone.'

261

Ninth.

The Court erred in overruling defendant's objection to, and in admitting the testimony hereinafter set out as given by J. L. W. Zeitlow over defendant's objection that such evidence was incompetent, irrelevant and immaterial; that it does not tend to prove any of the issues in this case, and that it is in no way binding upon the defendant; that no proper foundation has been laid, and further reason that it is an attempt by oral and extrinsic testimony to prove the meaning, scope and effect of such ordinance, and that the language of ordinances themselves is the only evidence of such meaning, scope and effect, and for the further reason that the meaning, scope and effect of such ordinance has been heretofore determined by the Supreme Court of the State of South Dakota. Objection overruled. Exception allowed.

The evidence objected to is as follows:

"The Blake transmitters were in common use from 1883 to 1905 and 1906. That is, they were used principally in the earlier period and gradually disappeared in the latter. They were used principally in telephone exchanges in short lines. The solid back transmitter was patented in 1892 by Anthony C. White. They were first used for long distance purposes and were gradually put in service in local exchanges, the first I knew of it from 1890 to 1896, and from that time on they were substituted as far as they could be had. Prior to the time they came into general use, they were sometimes supplied specially to subscribers who wanted special or better service over long distances. These solid back instruments were known by the trade name of 'long distance telephone instruments.'

262 A successful conversation could be heard through the Blake transmitter from a distance of 25 to 100 miles according to the other conditions of the line and construction; with a solid back, you could talk over a thousand miles. My company began to install the solid back transmitter for general use in local exchanges from 1898 to 1906. I mean by that, that we after that time did not use any other transmitter. I was president of the Dakota Central Telephone Lines Company in 1904."

Tenth.

The Court erred in overruling defendant's objection to the following question propounded to J. L. W. Zeitlow:

"Q. How are they classed with reference to long distance telephones or otherwise?"

Mr. Miller: That is objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness; that it don't tend to prove any of the issues in this case, and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances No. 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has construed the meaning, scope and effect of such ordinances contrary to the contention of plaintiff in this action. Objection overruled. Exception allowed.

263 A. They are long distance transmitters and telephones.

There are approximately between eleven and twelve hundred subscribers to the local exchange in Mitchell and about one-fourth of them are business telephones. The subscriber secures connections with the toll lines by inserting the finger in the place called 'long distance' and rotating the dial to the stop and then letting the dial work back, and then the long distance operator puts the subscriber in connection with his party."

Eleventh.

The Court erred in overruling defendant's objection to the following question propounded to the witness, John Osteline, to-wit:

"Q. While you were in Minneapolis, were there any Blake transmitters in use at that time?"

Mr. Miller: This is objected to as incompetent, irrelevant and immaterial; that it don't tend to prove any of the issues in this case and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances No. 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has construed the meaning, scope and effect of such ordinances contrary to the contention of the plaintiff in this case. Objection overruled. Exception allowed.

264 "A. No, sir, there was not; not to my knowledge, there was not."

The witness further testified over the same objection as above, that the transmitter in use at that time was called the solid back long distance transmitter and that in the early days the instrument was designated as the "Blake Transmitter" and "Long distance transmitter" and many called it the "solid back."

Twelfth.

The Court erred in sustaining the complainant's objection to the following question propounded to witness, George E. Foster, for the defendant:

"Q. What do you understand by long distance telephone?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. My understanding of a long distance telephone was to connect different towns in different parts of the state, so as to talk with people outside of Mitchell."

Thirteenth.

The Court erred in sustaining the complainant's objection to the following question propounded to George E. Foster, witness for the defendant:

"Q. That is what you understood by the term 'long distance' telephone at the time of the passage of this ordinance?"

Objected to as incompetent and immaterial and could not be received to interpret the ordinance. Objection sustained. Exception allowed.

"A. That is what I understood."

265

Fourteenth.

The Court erred in sustaining the complainant's objection to the following question propounded to A. J. Kings, witness for the defendant:

"Q. You may state what your understanding is of the term 'long distance'?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. I understand it is a line running from different towns and connecting the different towns in the country."

Fifteenth.

The Court erred in sustaining complainant's objection to the following question propounded to A. J. Kings, as witness for the defendant:

"Q. Did you so understand the term 'long distance telephone' at the time this ordinance was passed?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. Yes, as connecting different towns around."

Sixteenth.

The Court erred in sustaining the complainant's objection to the following question asked of defendant's witness, A. J. Kings, to-wit:

"Q. You may state whether or not at the time this ordinance No. 180 was passed, you intended as a member of the City Council to grant a franchise to the Dakota Central Telephone Lines for the purpose of constructing and operating a local exchange in the City of Mitchell, South Dakota?"

266 Objected to as incompetent and immaterial for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. I did not understand it as a local exchange. We already had one."

Seventeenth.

The Court erred in sustaining complainant's objection to the following question propounded to the witness, J. E. Wells for the defendant:

"Q. State what you understand by the term 'Long distance'?"

Objected to as incompetent and immaterial and no foundation laid for it. Objection sustained. Exception allowed.

"A. It is a telephone connection from one town to another."

Eighteenth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"Q. That was your understanding of that term 'long distance telephone' at the time these ordinances were passed was it?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. That is the way I remember it."

267

Nineteenth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"Q. As far as you remember, Mr. Wells, did you intend at the

time you voted for these ordinances to grant to the Dakota Central Telephone Lines a franchise for the purpose of owning and operating a local telephone system or exchange in the City of Mitchell?"

Objected to as immaterial and incompetent and cannot be received for inferring the interpretation of ordinances. Objection sustained. Exception allowed.

"A. It wasn't my idea at the time."

Twentieth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"Q. Your understanding was that they were simply getting a long distance franchise to connect the city with places outside the city by telephone?"

Objected to as incompetent, immaterial and cannot be received for the purpose of inferring the interpretation of the ordinance. Objection sustained. Exception allowed.

"A. Yes, sir."

Twenty-first.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. What do you understand by the term 'long distance telephone'?"

268 Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. Long distance would be to telephone to places outside of the city—to other towns."

Twenty-second.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. Was that the understanding you had of the term 'long distance' at the time these ordinances were passed?"

Objected to as immaterial and incompetent for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. Yes sir, that was my understanding at that time, that it was for long distances to connect with other towns and people at a long distance."

Twenty-third.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. Did you intend as a member of the City Council in voting for the passage of Ordinance No. 180 to grant to the Dakota Central Telephone Company the right and privilege of owning and operating a local telephone system or exchange within the City of Mitchell, South Dakota?"

269 Objected to as immaterial and incompetent and inadmissible for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. I didn't vote with the understanding that they were to have any local telephone. It was long distance. What the ordinance called for was long distance and communication outside of the city."

Twenty-fourth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Mr. Silsby, what do you understand by the term 'long distance telephone'?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. The facilities for connecting between points or between different towns and cities."

Twenty-fifth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Did you understand that if I phoned from the office up to your office at the Elks that that would be a long distance telephone or do you mean to say the points should be in different localities or towns?"

270 Objected to as immaterial and no proper foundation has been laid for it. Objection sustained. Exception allowed.

"A. Generally speaking, I should understand it as between different towns."

Twenty-sixth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Was that the understanding you had of 'long distance telephones' at the time you signed these two ordinances I have heretofore mentioned?"

Objected to as incompetent and immaterial, and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. I think it was. That was my understanding at that time."

Twenty-seventh.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Then as far as you know that was the understanding of the other members of the council, was it not?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. I think that that was the sense of the council."

271

Twenty-eighth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. In the passing of these ordinances the City Council at the time as you understood it, did not intend to grant a franchise to the Dakota Central Telephone Lines to own and operate a local telephone or exchange in the City?"

Objected to as immaterial and incompetent and cannot be received for the varying of the interpretation of the ordinances.

"A. No, sir."

Wherefore, the Appellant prays that said decree be reversed and that said District Court for the District of South Dakota be ordered to enter a decree reversing the decision of the lower Court in said cause.

LAURITZ MILLER,
EDWARD E. WAGNER,
Attorneys for Appellant.

(Endorsed:) #5 S. D. Equity—District Court United States, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant—Due and personal service of the within Assignment of Errors upon me at Huron, South Dakota, is admitted this 15 day of April, A. D. 1916. Null & Royhl, Attorneys for Plaintiff—Gamble, Wagner & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota—Filed April 4, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

272 And, to-wit, on the same day, there was filed in the office of the clerk of said court, Petition for Appeal to the Supreme Court of the United States; which said Petition is in words and figures the following, to-wit:

273 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Petition for Appeal to the Supreme Court of United States.

To the Honorable Wilbur F. Booth, District Judge:

The above named defendant, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 14th day of September, A. D. 1915, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States, sitting at the City of Washington, in the District of Columbia, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Dated this 31st day of March, A. D. 1916.

LAURITZ MILLER,
EDWARD E. WAGNER,
Attorneys for Defendant.

(Endorsed:) #5 S. D. Equity—United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant—Due and personal service of

the within Petition for Appeal to the Supreme Court of the 274 United States upon me at Huron, South Dakota, is admitted this 15 day of April, A. D. 1916. Null & Royhl, Attorney for Plaintiff—Gamble, Wagner & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota—Filed April 4, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And afterwards, to-wit, on the 15th day of April, A. D. 1916, there was filed in the office of the clerk of said court, Order allowing Appeal; which said Order is in words and figures the following, to-wit:

275 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,
Plaintiff,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Order Allowing Appeal.

On motion of Lauritz Miller, and Edward E. Wagner, Solicitors and Counsel for Defendant, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Two thousand dollars (\$2,000.00), the same to act as a bond for costs and damages on appeal.

Dated this 15th day of April, A. D. 1916.

By the Court:

WILBUR F. BOOTH,
United States District Judge.

Attest:

OLIVER S. PENDAR, *Clerk,*
By C. C. SCHWARZ, *Deputy.*

[Seal of Court.]

276 (Endorsed:) #5 S. D. Equity—United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant—Due and personal service of the within Order Allowing Appeal upon me at Huron, South Dakota; is admitted this 15 day of April, A. D. 1916. Null & Royhl, Attorney- for Plaintiff—Gamble, Wagner & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota—Filed April 15, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And, to-wit, on the same day, there was filed in the office of the clerk of said court, Bond on Appeal; which said Bond is in words and figures the following, to-wit:

277 In the District Court of The United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Bond on Appeal.

Know All Men By These Presents: That we, The City of Mitchell, a municipal corporation, as principal and S. H. Scallin and E. W. Heyler, as sureties, of the County of Davison, State of South Dakota, are held and firmly bound unto Complainant, in the sum of Two thousand dollars (\$2000.00), lawful money of the United States, to be paid to complainant, its successors or assigns; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 3rd day of April, A. D., 1916.

Whereas, the above bounden defendant has prosecuted an appeal to the Supreme Court of the United States to reverse the decree of the District Court for the District of South Dakota, in the above entitled cause.

Now Therefore, the condition of this obligation is such that if the above named defendant shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE CITY OF MITCHELL, SOUTH DAKOTA,
By A. E. HITCHCOCK, *Mayor.*
S. H. SCALLIN.
E. W. HEYLER.

Attest:

[SEAL.] THOMAS EASTCOTT,
City Auditor.

STATE OF SOUTH DAKOTA,
County of Davison, ss:

On the 3d day of April, A. D., 1916, personally appeared before me, S. H. Scallin and E. W. Heyler respectively known to me to be the persons described in and — duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said S. H. Scallin and E. W. Heyler being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said county of Davison and that he is worth the sum of Two thousand dollars (\$2000.00)

over and above his just debts and legal liability and property exempt from execution.

S. H. SCALLIN.
E. W. HEYLER.

Subscribed and sworn to before me this 3d day of April, 1916.
[NOTARIAL SEAL.] E. K. LOOMER,
Notary Public, South Dakota.

279 The within bond is approved as to sufficiency and form this 15th day of April, A. D., 1916.

WILBUR F. BOOTH,
United States District Judge.

This is to certify that the undersigned has personally known the above named sureties for a number of years and is thoroughly familiar with their financial responsibility and that he unqualifiedly recommends them as sufficient sureties on the above bond.

LAURITZ MILLER,
Att'y for City of Mitchell.
EDWARD E. WAGNER,
Attorney for Defendant.

(Endorsed:) # 5 S. D. Equity—District Court of United States, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendants—Due and personal service of the within Bond on Appeal upon me at Huron, South Dakota, is admitted this 15 day of April, A. D. 1916. Null & Royhl, Attorneys for Plaintiff—Gamble, Wagner, & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota—Filed April 15th, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And afterwards, to-wit, on the 11th day of May, A. D. 1916, there was filed in the office of the clerk of said court, Praecept for Record on Appeal; which said Praecept is in words and figures the following to-wit:

280 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, Plaintiff,
vs.
THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Praecept.

To Oliver S. Pendar, Clerk of said Court:

Please incorporate in the transcript of the record on the appeal of said case to the Supreme Court of the United States, in accordance

with the appeal allowed on the 15th day of April, 1916, the following papers:

Bill of Complaint.

Process of Subpoena and return of Marshall thereon.

Answer of the Defendant, (Except Exhibits A, B, C, D, thereto attached which appear in agreed statement or "stipulation").

Decree of the Court.

Opinion of the Court.

Petition for Appeal.

Order allowing Appeal.

Assignment of Errors.

Bond on Appeal.

Citation, and Clerk's Certificate thereon.

Order extending time to allow settling Statement of Evidence, Statement of Evidence, and Certificate of Judge allowing the same.

LAURITZ MILLER,

EDWARD E. WAGNER,

Attorneys for Appellant.

281 (Endorsed:) United States District Court, District of South Dakota, Southern Division—Dokato Central Telephone Company, Plaintiff, vs. The City of Mitchell, Defendant—Due and personal service of the within Praeice upon us at Huron, South Dakota, is admitted this 9th day of May, A. D. 1916, Null & Royhl, Attorneys for Plaintiff—Gamble, Wagner & Danforth, Attorneys for Defendant, Sioux Falls, South Dakota. Filed May 11th, A. D., 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

282 UNITED STATES OF AMERICA,

Southern Division, District of South Dakota, ss:

I, Oliver S. Pendar, Clerk of the District Court of the United States, in and for the the District of South Dokato, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 281 pages, numbered consecutively from 1 to 281 inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree, as enumerated in the written praecipe of the party appellant to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court, and I do further certify and return that I have annexed to said transcript, and included within said paging, the original Citation, together with the admission of service thereon, and in addition thereto a copy of said praecipe, and all written opinions of the Court filed in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, in the said District, this 10 day of June, A. D. 1916.

[United States internal revenue documentary Stamp, series of 1914, 10 cents, canceled C. C. S.]

OLIVER S. PENDAR, *Clerk,*
By C. C. SCHWARTZ, *Deputy.*

283 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Order.

It appearing to the Court that the Appellant and defendant can not without very great inconvenience to the parties, docket said case and file the record thereof with the Clerk of the Supreme Court of the United States on or before the return day named in the citation, issued herein on the 15th day of April A. D., 1916, and that the Clerk of the District Court will not be able to prepare the record thereof within time to enable the Appellant to docket the case and file the record thereof with the Clerk of the Supreme Court, by or before the return day fixed in said citation, and both of the parties hereto, having stipulated in writing for the enlargement of the time, it is hereby ordered that Appellant's time within which to docket said case and file the record thereof with the Clerk of the Supreme Court, be, and the same is hereby enlarged and extended for an including a period of sixty days from and after the return day fixed in said citation, that is to say: that Appellant's time within which to docket said case and file the record thereof with the Clerk of the Supreme Court is hereby enlarged and extended to and including the 15th day of August, A. D., 1916.

WILBUR J. BOOTH,

Judge of the United States District Court, Sitting by Special Assignment in Lieu of Hon. James D. Elliott, Judge of said District, Disqualified.

Attest:

— — — , Clerk.

284 [Endorsed:] United States District Court, District of South Dakota, Southern Division. Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, Defendant. Due and personal service of the within order enlarging time to file record in Supreme Court upon us at Huron, South Dakota, is admitted this 9th day of May, A. D. 1916. Null & Royal, Attorney- for Plaintiffs. Gamble, Wagner & Danforth, Attorneys for Defendant, Sioux Falls, South Dakota.

285 In the Supreme Court of the United States,

No. 531.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant and Appellee,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant and Appellant.

Statement of Points and Designation for Printed Record by Appellant.

To the clerk of said court:

The following are the points on which Appellant intends to rely on this appeal.

Statement of Points.

First.

That the United States District Court for the District of South Dakota erred in taking and entertaining jurisdiction of this suit; that said Court did not have jurisdiction to hear and determine the same for the following reasons:

(a) Because the Resolution of the defendant City of March 17th, 1913, the enforcement of which plaintiff seeks by this suit to enjoin, is not a law and did not, and does not have the force of effect of a law of a state, impairing the obligations of a contract, within the meaning of Section 10, Article 1 of the Constitution of the United States.

(b) The Supreme Court of the State of South Dakota has considered and decided that a resolution of a city council in said state, is not of equal dignity with and does not operate as a repeal 286 of, an ordinance enacted by a city council, and such decision is conclusive of this question and binding upon the Federal Courts. (Assignment of Error No. 1.)

Second.

The District Court erred in adjudging and entering its decree that plaintiff is and since June 7th, 1904, has been rightfully and lawfully maintaining and operating under the rights and privileges granted to the Dakota Central Telephone Lines (Inc.) by Ordinance No. 180 of the defendant, City, two separate and distinct telephone exchanges or systems, one for local and one long distance or toll lines, or that it acquired any right whatsoever to maintain and operate a local telephone exchange or system within said City under said Ordinance No. 180, for the following reasons:

(a). The sole right and authority of plaintiff to maintain and

operate a local telephone exchange or line within the said defendant City was acquired by and through Ordinance No. 135 of said City, "Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System." Passed by the City Council May 11th, 1898; that the franchise and all rights granted by said Ordinance expired by the terms thereof May 11th, 1913.

(b). That said Ordinance No. 180 did not grant to the Dakota Central Telephone Lines (Inc.) under which plaintiff claims, does not and never did authorize the Dakota Central Telephone Lines (Inc.) its successors or assigns, to maintain and operate a local telephone exchange within said City.

(c). The plaintiff herein was and is precluded and estopped from maintaining this suit, because of the adjudication by the Supreme Court of the State of South Dakota, in the case of City of Mitchell, et al., vs. Dakota Central Telephone Company, decided May 24th, 1910, 25 S. D. 409; (127 N. W. 562) wherein said Court 287 considered said Ordinance and decided that said Ordinance No. 180 did not repeal Ordinance No. 135, and that said Ordinance No. 135 was for a local telephone system within the defendant City, and that said Ordinance No. 180 only authorized a long distance telephone system within and through said City, and that said construction and decision by said State Court in res adjudicata and conclusive of this question against plaintiff, and it cannot be heard upon the same question in this suit.

(d). It affirmative appears from the record and is undisputed that notwithstanding said Ordinance No. 180, plaintiff continued to operate and maintain its local telephone exchange within the defendant city from the date of the passage of said Ordinance No. 180, to-wit: June 7th, 1904, under the authority of said Ordinance No. 135 and paid the gross earnings tax imposed thereby, and otherwise complied therewith until the expiration of all of the rights granted thereby, to-wit: May 11th, 1913, and the plaintiff thereby placed a practical construction upon said ordinance, as well as Ordinance No. 180, to the effect that said Ordinance No. 135 granted the right to own and maintain only a local telephone exchange within the defendant City, and that said Ordinance No. 180 granted authority only to maintain and operate a long distance telephone exchange; that the interpretation of said Ordinance so adopted by plaintiff was determined by the Supreme Court of South Dakota, in the case of City of Mitchell vs. Dakota Central Telephone Company, supra, and that the rights of plaintiff under said Ordinance, and particularly No. 180, were found and conclusively determined in said action, and the same became res adjudicata of said question, and plaintiff is bound thereby and estopped from urging the same question in this action, and Federal Courts are bound by the interpretation of said Ordinance adopted by said State Supreme Court.

(e). That plaintiff is precluded and estopped by the decision of

288 said Supreme Court in the case of City of Mitchell vs. Dakota Central Telephone Company, *supra*, from urging in this Court the repeal of said Ordinance No. 135 by the Resolution adopted by the defendant City, April 10th, 1907, because:

1. Said Resolution did not in effect repeal, or pretend to repeal, said Ordinance No. 135 but simply granted plaintiff permission to place its wires underground when and where conditions required.

2. Said Resolution was not of equal dignity with said Ordinance No. 135 and could not operate as a repeal of said Ordinance.

3. The State Supreme Court in the case above cited, decided that said Resolution did not operate as a repeal of said Ordinance No. 135, and that decision was and is res adjudicata as against plaintiff, and plaintiff is estopped from raising that question in this action; that the decision of said Supreme Court should be respected and followed by Federal Courts. (Assignment No. 2.)

Third.

That said District Court erred in adjudging and entering its decree that said Resolution of March 17th, 1913 was and *in* unconstitutional and void and impairs the obligations of a contract between the parties thereto, contained in said Ordinance No. 180, in violation of Section 10, Article 1 of the Constitution of the United States, and that it deprives plaintiff of property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, for all of the reasons stated in Assignments numbered First and Second herein.

Fourth.

That said District Court erred in enjoining and restraining the defendant City, its officers, agents, attorneys and servants from interfering with the poles, telephone lines and telephone exchanges now owned and operated by plaintiff in the defendant City, because such injunction unjustly interferes with the exercise of the police power of the defendant City, and unjustly deprives it of the right to 289 impose reasonable conditions and burdens upon the plaintiff's right to operate and maintain any local telephone exchange within said City. (Assignment No. 4.)

Fifth.

The Court erred in admitting the testimony of N. L. Lane and other witnesses concerning the history and uses of the various kinds of telephone transmitters and devices as set forth in the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Assignment of Errors.

Sixth.

That the Court erred in sustaining objections to the testimony of George E. Foster and other witnesses offered on behalf of the de-

fendant as to the meaning and general understanding of the term "long distance telephone," as set forth in the Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh and Twenty-eighth Assignment of Errors.

Appellant deems the entire record necessary for the consideration of the foregoing points, and respectfully requests that the same be printed.

LAURITZ MILLER,
EDWARD E. WAGNER,
Attorneys for Appellant.

290 [Endorsed:] 531—16/25361. In the Supreme Court of the United States. Dakota Central Telephone Company, a corporation, plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant. Due and personal service of the within statement of points and designation for printed record at appellant upon us at Huron, South Dakota; is admitted this 30th day of June, A. D. 1916. T. H. Null, Attorneys for Appellee. Gamble, Wagner & Danforth, Attorneys for Appellant, Sioux Falls, South Dakota.

291 * [Endorsed:] File No. 25361. Supreme Court U. S., October term, 1916. Term No. 531. The City of Mitchell, Appellant, vs. Dakota Central Telephone Co. Statement of points to be relied upon and designation by appellant of entire record to be printed. Filed July 6, 1916.

Endorsed on cover: File No. 25,361. S. Dakota D. C. U. S. Term No. 531. The City of Mitchell, appellant, vs. Dakota Central Telephone Company. Filed June 24th, 1916. File No. 25,361.

IN THE SUPREME COURT OF THE UNITED
STATES

OCTOBER TERM, 1916

The City of Mitchell,

Appellant.

vs.

Dakota Central Telephone Company,

Respondent.

} APPELLANT'S
BRIEF

ABSTRACT OR STATEMENT OF THE CASE

This is an equity suit and was originally instituted by the Dakota Central Telephone Company as complainant against appellant, in the United States District Court for the district of South Dakota, for the purpose of securing an injunction against appellant restraining it from in any manner other than by the exercise of lawful police power, interfering with the poles, telephone lines and telephone exchange owned and operated by complainant in appellant city. Issue was duly joined in said action by appellant serving and filing its answer to complainant's Bill of Complaint. The cause was submitted to the District Court, Judge Wilbur F. Booth of St. Paul, Minnesota, presiding in place of Judge James D. Elliott, upon certain stipulations of fact agreed to and upon certain evidence submitted by the respective parties. On the 10th day of September, 1915, the District Court entered its judgment, awarding to the complainant, the relief prayed for. From this judgment the appellant herein prosecutes this appeal.

The complainant in its Bill of Complaint alleges in substance that since August 30, 1904, it has been a corporation under the laws of South Dakota, empowered to purchase, lease, construct and operate telephone lines and exchanges and that under Section 554, Civil Code of South Dakota, it was granted the right of way for telephone purposes over the public grounds, streets, alleys and highways in the State of South Dakota; that said Section 554, Civil Code is as follows:

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said line shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations."

3 That complainant is the owner of and operates a local telephone exchange in eighty-five cities in South Dakota and owns and operates two hundred sixty-five telephone stations, other than exchanges, situated in the States of South Dakota, North Dakota, and Minnesota; that all of such towns and cities are connected by long distance telephone lines owned and operated by the complainant; that on May 11, 1898, the City Council of Appellant City adopted the following Ordinance, known as Ordinance No. 135:

“ORDINANCE NO. 135.

An ordinance granting to F. B. Elce, his associates, heirs, and assigns the use of the streets, alleys and public grounds of the City of Mitchell, South Dakota, for the erection and maintenance of a public telephone system.

Be it ordained by the city council of the City of Mitchell, South Dakota.

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said city, the said F. B. Elce, his associates, heirs and assigns

are hereby granted the right to the use of the streets, alleys, and public grounds of the said City of Mitchell, South Dakota, for the erection and maintenance of a public telephone system for the term of fifteen years from
the date of the adoption or approval of this
ordinance.

Section 2. That for such purposes the said F. B. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said City of Mitchell, and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system. Provided, that such poles, wires, and appliances shall not be so placed as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines or poles, wires and other appliances, shall be located as far as possible in the alleys of said city. Provided further that in no case shall the poles, wires and other appliances be placed on Main street, except for the purpose of crossing said Main street upon the streets running east and west. It is also provided that the said city council shall have the right to direct the location of all poles and lines or wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the City Council of said City of Mitchell.

Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval
5 of this ordinance have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs, and assigns, shall provide a suitable and convenient place for a central office, and shall maintain such office in operation during the business hours of each week day during the year, and at such other times as the business may demand; and the maximum rent for the said paying telephones established under this ordinance shall not exceed two dollars per month for business houses and one dollar and twenty-five cents per month for residence houses, for service within the City of Mitchell; provided, that if the said F. B. Elce, his as-

sociates, heirs, and assigns, shall fail or neglect to have at least twenty telephones in successful operation at the expiration of six months from the adoption and approval of this ordinance then this ordinance shall be null and void and all rights and privileges granted thereunder revoked.

Section 4. That in consideration of the said City of Mitchell granting to the said F. B. Elce, his associates, heirs and assigns the right and privilege to use the streets, alleys and public grounds, of the said City of Mitchell for the erection and maintenance of a public telephone system, the said F. B. Elce, his associates, heirs and assigns, shall erect and maintain three tele-

6 phones at such places as the city council shall direct, and that the said three telephones shall be furnished to the said city during the term of fifteen years without cost or expense to the City of Mitchell; provided also, that at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of two thousand four hundred dollars (\$2,400), the said F. B. Elce, his associates, heirs and assigns, shall pay to the City of Mitchell ten per cent of the amount in excess of Two Thousand Four Hundred Dollars (\$2,400), received as gross receipts from the said telephone system, which said sum shall be paid to the City at the end of each and every year, and the city council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section 6. That if the said F. B. Elce, his associates, heirs, and assigns, shall fail to comply with any of the provisions of this ordinance, then the city council of the City of Mitchell, shall have the power to declare the
7 privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intention shall be given by the said city council to the said F. B. Elce, his associates, heirs and assigns, and a

reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and approved May 11, 1898.

THOMAS FULLERTON, Mayor.

Attest: J. K. SMITH,
City Auditor."

That Mr. Elce, the grantee in said Ordinance accepted the same and complied with its terms; that in 1904, the appellant City, upon the application of the Dakota Central Telephone Lines, a corporation, organized under the laws of South Dakota, passed the following ordinance, known as Ordinance No. 174:

"ORDINANCE NO. 174

An Ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns, the right to erect poles, and fixtures, and to string wires, for the purpose of operating long distance telephone lines, within and through the City of Mitchell, South Dakota.

Be it ordained by the City Council of the City
8 of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Telephone Lines (Inc), their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main Street, Park Avenue, Fourth Street and Fifth Street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of the street commissioner, or a committee appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways, or shade or ornamental trees, in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said City of Mitchell; and the City of

Mitchell may adopt any reasonable rules and
9 regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell, S. D., shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect, from and after the date of its passage and approval.

Passed March 21, 1904.

Approved,

J. L. HANNETT, Acting Mayor.

J. G. MARKHAM, Auditor."

That upon further application of said Dakota Central Telephone Lines, the City Council of Appellant City passed an ordinance known as Ordinance No. 180, which is as follows:

10 "ORDINANCE NO. 180.

An ordinance to grant permission to the Dakota Central Telephone Lines (Inc), their successors, or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the City of Mitchell, South Dakota.

Be it ordained by the City Council of the City of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Telephone Lines (Inc.), their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets, at right angles, where it is necessary, and maintain the same for a period of twenty years from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

11 Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said City of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell, shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

THE CITY OF MITCHELL VS.

Section 6. This ordinance shall be in effect, from
and with the date of its passage and approval.
12 Passed June 6, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, Mayor.

J. G. MARKHAM, Auditor."

It is further alleged in complainant's complaint that at the time of the passage of Ordinance No. 174 and No. 180, the telephone instruments in general use in telephone exchanges and in the telephone exchanges in Mitchell could not be successfully used for conversations over long distances, but that there had been developed certain telephone instruments known as "long distance telephone" which were furnished to subscribers by special arrangements and could be used for both local and long distance work. That prior to the adoption of Ordinances No. 174 and 180 the Southern Dakota Telephone Company had constructed long distance telephone lines into the City of Mitchell from other cities; that the Dakota Central Telephone Lines in 1903, purchased the property of the Southern Dakota Telephone Company, and in 1904, it purchased the local telephone exchange from F. B. Elce, the grantee in Ordinance No. 135, and the same year all of these properties together with all the franchises were purchased by and transferred to the complainant and
the complainant has since that time and now is
13 engaged in operating all of said properties.

The complainant further alleges that in 1907 it desired to install an automatic telephone system in appellant city and to properly install such system it was necessary to build certain underground ways for the wires and cables and upon complainant's application appellant city passed the following resolution, to-wit:

"Be it Resolved, By the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets, alleys and public grounds of said City all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

That complainant thereupon installed said automatic system and placed all wires in the business section of the city underground, and erected a fire-proof building, all at a cost of \$110,000; that by reason of the foregoing, the complainant claims a vested right to maintain and operate said telephone exchange and lines and to protect such rights this suit was instituted; that the complainant now owns and operates long distance telephone lines from the City of Chamberlain on the west,
14 through the City of Mitchell to cities of Marshall and Heron Lake, in the State of Minnesota, and from the cities of Edgely, Lamour and Oakes, North Dakota, on the north, through the City of Mitchell, to the City of Running Water in South Dakota, on the south, that inter-state telephone messages are carried on these lines; that the complainant transmits the United States weather reports to thirty-two cities in the state of South Dakota, and furnishes telephone service to officers of the United States Government at cities and towns where such officers are situated and at the Indian agencies at Ft. Yates, North Dakota, Cheyenne Agency, Yankton Agency and Sisseton Agency in South Dakota.

That the City Council of appellant city, on the 17th day of March, 1913, adopted the following Resolutions, to-wit:

“TELEPHONE RESOLUTION

Whereas, The Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, “An Ordinance Granting to F. B. Elce, his associates, Heirs
15 and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the erection and maintenance of a Public Telephone System” and adopted the 11th day of May, 1898; and,

Whereas, The rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas, The Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305 of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local system or exchange in the City of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and,

Whereas, The said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota; and,

Now Therefore, Be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege
16 of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and,

Be it further resolved that the said Dakota Central Telephone Company be, and it is hereby, notified and required that in case said company fails, neglects or refuses to comply with the provisions of this resolution and to remove from the streets, alleys, avenues and public

17 grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zietlow, the president of said company at Aberdeen, South Dakota, and that the city auditor of the city of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zietlow in accordance herewith; and,

Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the president of said company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council, of the City of Mitchell, South Dakota, relative to the matter herein contained.

18 Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, Mayor.

Attest: N. H. JENSEN, City Auditor."

"FIRE ALARM RESOLUTION

Whereas, the rights of the Dakota Central Telephone Company to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota, ceases and terminates on the 11th day of May, 1913; and,

Whereas, the said Dakota Central Telephone Company has heretofore furnished the City of Mitchell, South Dakota, all necessary fire alarm service.

Now therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, that the City of Mitchell, South Dakota, purchase and install a fire alarm system for said City of Mitchell, South Dakota, to be used from and after the 11th day of May, 1913; and,

Be it further resolved that the City Engineer of the City of Mitchell, South Dakota, be and he is hereby authorized and directed to prepare plans and specifications for a complete and adequate fire alarm system for the City of Mitchell, South Dakota, and to report said plans and specifications as soon as completed, to the City Council of the City of Mitchell, South Dakota.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, Mayor.

Attest: N. H. JENSEN, City Auditor."

19 "TELEPHONE RESOLUTION

Whereas, the right of the Dakota Central Telephone Company to construct, maintain, and operate a local telephone exchange or system, in the City of Mitchell, South Dakota, will cease and terminate on the 11th day of May, 1913; and,

Whereas, the City Council of the City of Mitchell, South Dakota, and the said Dakota Central Telephone Company have failed to agree upon the terms and conditions upon which the said company might continue to operate and maintain a local telephone exchange or system in the City of Mitchell, South Dakota, from and after the said 11th day of May, 1913; and,

Whereas, the City Council of said city is desirous of protecting its rights in said matter.

Now therefore, to protect its said rights and to avoid waiving said rights.

Be it Resolved, by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called this 17th day of March, 20 1913, that all the officers and employees of the said

City of Mitchell, South Dakota, be and they are hereby directed and requested not to contract, either directly or indirectly, with the Dakota Central Telephone Company, for any local telephone service from said

company in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913, until the controversy now existing between said city and the company have been adjusted, and that they are further directed and requested to terminate, on the said 11th day of May, 1913, all relations existing on that date, between them and the Dakota Central Telephone Company relative to local telephone service furnished by said Dakota Telephone Company, in said City of Mitchell, South Dakota.

Adopted and approved the 17th day of March, 1913.

A. E. HITCHCOCK, Mayor.

Attest: N. H. JENSEN, City Auditor."

That the appellant city threatens to remove the local telephone exchange of the complainant from the city; that said resolution apply to the complainant alone and that appellant city threatens to prevent by force and by legal proceedings the complainant from operating, extending and renewing its said telephone lines and exchanges within appellant city.

Complainant further claims that the resolutions above set out had the force and effect of a law of the State of South Dakota within the intent and meaning of Section ten, Article One, of the United States Constitution, and that such resolution is a law which impairs the obligation of the contracts arising between the complainant and the State of South Dakota, and the City of Mitchell, by reason of the granting to the complainant, its charter rights, and the consent of the City of Mitchell to the construction of the telephone lines and exchange in said city.

That the value of complainant's telephone exchange and lines situated in the City of Mitchell consists largely in labor and for the city to require complainant to remove such lines and exchanges will deprive complainant of its property without due process of law and will amount to a confiscation thereof in violation of the Fifth Amendment to the Constitution of the United States, and will interfere with complainant's inter-state business.

DEFENDANT'S ANSWER

The defendant in its answer admitted the corporate character of complainant, denied any knowledge of the

extent of complainant's business and denied that complainant acquired any rights in the streets of defendant city, by virtue of Section 544 of the Civil Code of the State of South Dakota, and averred that all the rights that complainant had in said streets were derived
22 from said Ordinances Nos. 135, 174 and 180, and that subject to the rights therein granted, the defendant had exclusive control of its streets. The defendant admits the passage of Ordinances No. 135, 174 and 180, and admits that the Southern Dakota Telephone Co. long prior to the passage of Ordinances No. 174 and 180 had built long distance telephone lines into the City of Mitchell but denies that said company had secured any permission thereto from said City and avers that the complainant had no other consent for long distance telephone lines in said city, than as granted in said Ordinances Nos. 174 and 180. Defendant further denies that the instruments in use in the local exchange at Mitchell at the time complainant purchased it could not be successfully used for long distance conversation. The defendant further admits that the Dakota Central Telephone Lines on May 25, 1904, entered into a contract for the purchase of Elce's interest in the telephone exchange erected and operated under Ordinance No. 135, but denies that said company relied upon the consent given in Ordinance 174.

It is also admitted that Complainant in 1904 became the purchaser of all of the telephone properties constructed in said city under Ordinances Nos. 135, 174 and 180, and all of the rights, privileges and obligations conferred and imposed by said ordinances.

Defendant further denies that complainant
23 had acquired any vested rights to operate a local exchange in said city, except as granted in Ordinance No. 135 and that this right expired May 11th, 1913.

The defendant further denies any knowledge of complainant's long distance telephone business, its interstate character, its relation with the United States Weather Bureau and Indian Agencies and officers; denies that defendant has ignored or disregarded any vested rights of the complainant or that it will ignore or disregard the laws of the United States or of the State of South Dakota, or that it will interfere with complain-

ant's inter-state telephone business, and avers that the sole purpose of passing the telephone resolution of March 17, 1913, was to give complainant timely notice of the termination of its rights to operate a local exchange under Ordinance 135, and to exclude its local exchange from the said City after the expiration of Ordinance No. 135. The defendant further denies that the resolution of March 17, 1913, was intended to apply to complainant's long distance telephone lines operated under Ordinances Nos. 174 and 180, and denies any intention to interfere with such long distance telephone lines. The defendant further denies that the resolution of March 17, 1913, has the force of a law impairing the obligation of any contract between complainant and defendant or that it will

24 in any manner impair any vested rights of the complainant. The defendant further denies that

anything done or threatened to be done by the defendant will impair any contract between complainant and defendant or any of its property rights or franchises vested in it by the State of South Dakota and consented to by the defendant, and denies that any rights had become vested in complainant by virtue of any acts of the defendant which will in any way be impaired by the things done or threatened to be done by the defendant.

The defendant further alleges that complainant in 1904, purchased the local telephone exchange and franchise of F. B. Elce, the grantee in Ordinance No. 135, and has owned and operated same under the terms and conditions of said Ordinance No. 135, and that the complainant for a long time after the passage of Ordinance Nos. 174 and 180 made no claim that it was operating its local exchange under these ordinances, but that it complied with all the terms and conditions of Ordinance No. 135 and from 1904 until 1910, except for the year 1907 and 1908, complainant paid to defendant city the ten per cent gross earnings required by Ordinance 135, that it furnished the defendant city with three free telephones, complied with the rates prescribed in said Ordinance No. 135, and paid the said ten per cent on the gross earnings

for the year 1907 and 1908 under a judgment of
25 the Supreme Court of the State of South Dakota;

The defendant further alleges that before complainant incurred any expense in building its exchange building and installing its automatic system notice was served upon complainant by defendant that its rights to maintain an automatic local telephone exchange would terminate with the expiration of Ordinance No. 135, on May 11, 1913. The defendant further alleges that at all the times covered by the Bill of Complaint, the complainant has been owning and operating two separate and distinct telephone systems and exchanges in the defendant city, to-wit: A local exchange whereby residents of the city are enabled to communicate with each other at a flat rate per month, and a long distance system whereby residents of the city can communicate with people residing outside and at a distance from the city, and that such service is paid for according to distance the message is transmitted and the length of time consumed in sending it, and that the local exchange was constructed, owned and operated under the terms of Ordinance No. 135, while the long distance system was owned and operated under the terms of Ordinances No. 174 and 180.

26 The defendant further alleges that the respective rights of the parties, the validity, scope, effect and construction of Article X, Section 3, of the South

Dakota Constitution, Subdivisions 7, 9, 10 and 17, of Section 1229 of the Revised Political Code of the State of South Dakota, and of Section 554 of the Revised Civil Code of 1903, of South Dakota, and of Ordinances No. 135, 174 and 180, and of the resolution passed and adopted by the City Council of defendant city on the 10th day of April, 1907, had all been determined and adjudicated in favor of the defendant city, by the Supreme Court of the State of South Dakota, in a decision rendered September 22, 1908, in a suit by the defendant City against the complainant for the collection of the ten per cent gross earnings for the years 1907 and 1908, provided for by Ordinance No. 135, and that one of the main defenses in that action was that the complainant here was not operating its said local telephone exchange under Ordinance No.

135, but was operating it under Ordinances No. 174 and 180, and the resolution of April 10, 1907, and that said Ordinance No. 135 had been repealed and superseded by said Ordinances No. 174 and 180, and the resolution of April 19, 1907.

The defendant further challenges the jurisdiction of the United States District Court over the matter in controversy on the ground that there is no diversity of citizenship between the parties herein, and that
27 the matters in this controversy do not arise under the constitution or laws of the United States, and that it appears upon the face of the Bill of Complaint that the determination of the rights of the respective parties do not involve any title, right, privilege or immunity conferred by the constitution or laws of the United States, or that will be defeated by a construction of the constitution or laws of the United States, and that the suit does not arise under any law regulating interstate commerce.

The foregoing sets out the main contention of the respective parties as developed in the pleadings.

The main points in controversy are as follows:

1. The jurisdiction of the United States District Court to hear and determine the matters in controversy.
2. The scope and interpretation to be placed upon Ordinances No. 174 and 180 as heretofore set out.
3. Whether or not the matters in controversy herein is res adjudicata so as to be binding upon the United States Courts, and

The cause was submitted upon certain stipulated facts and certain evidence taken in the form of depositions and submitted at the trial, and certain questions of evidence were raised, which questions are shown in the following specifications of error.

28 SPECIFICATIONS OF ERRORS

The appellant specifies the following errors upon which this appeal is predicated:

FIRST

That the United States District Court for the District of South Dakota erred in taking and entertaining

jurisdiction of this suit; that said court did not have jurisdiction to hear and determine the same for the following reasons:

(a) Because the Resolution of the defendant City of March 17, 1913, the enforcement of which the plaintiff seeks by this suit to enjoin, is not a law and did not, and does not have the force or effect of a law of a state, impairing the obligations of a contract, within the meaning of Section 10, Article 1, of the Constitution of the United States.

(b) The Supreme Court of the State of South Dakota has considered and decided that a resolution of a city council in said state, is not of equal dignity with and does not operate as a repeal of, an ordinance enacted by a city council, and such decision is conclusive of this question and binding upon the Federal Courts.

The resolution herein referred to is as follows:

29 "TELEPHONE RESOLUTION.

Whereas, the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135, of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the erection and Maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and,

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas, the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305, of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local telephone system or exchange in the City of Mitchell,

South Dakota, for a period of 20 years from and after the said 11th day of May, 1913; and,

Whereas, the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate 30 a local telephone system or exchange in the City of Mitchell, South Dakota; and

New Therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of said resolution and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be

necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zeitlow, the president of said Company at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zeitlow in accordance herewith; and,

32 Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the President of said Company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council, of the City of Mitchell, South Dakota, relative to the matter herein contained.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, Mayor.

Attest: N. H. JENSEN, City Auditor."

SECOND

The District Court erred in adjudging and entering its decree that plaintiff is and since June 7th, 1914, has been rightfully and lawfully maintaining and operating under the rights and privileges granted to the Dakota Central Telephone Lines (Inc.), by Ordinance No. 180, of the defendant City, two separate and distinct telephone exchanges or systems, one for local and one for long distance or toll lines, or that it acquired any right whatsoever to maintain and operate a local telephone exchange or system within said City under said Ordinance No. 180, for the following reasons:

(a) The sole right and authority of plaintiff to maintain and operate a local telephone exchange or line

33 within the said defendant City was acquired by
and through Ordinance No. 135, of said City,
"Granting to F. B. Elee, his Associates, Heirs and
Assigns the Use of the Streets, Alleys and Public
Grounds of the City of Mitchell, S. D., for the Erection
and Maintenance of a Pubile Telephone System."
Passed by the City Council May 11th, 1898; that the
franchise and all rights granted by said Ordinance ex-
pired by the terms thereof May 11th, 1913.

(b) That said Ordinance No. 180 did not grant to
the Dakota Central Telephone Lines (Inc.), under which
plaintiff claims, does not and never did authorize the
Dakota Central Telephone Lines (Inc.), its successors
or assigns, the right to maintain and operate a local tele-
phone exchange within said City.

(c) The plaintiff herein was and is precluded and
estopped from maintaining this suit, because of the ad-
judication by the Supreme Court of the State of South
Dakota, in the case of City of Mitchell, et al., vs. Dakota
Central Telephone Company, decided May 24th, 1910;
25 S. D. 409, (127 N. W. 582), wherein said Court con-
sidered said Ordinance and decided that said Ordinance
No. 180 did not repeal Ordinance No. 135, and that said
Ordinance No. 135 was for a local telephone system with-
in the defendant City, and that said Ordinance No. 180
only authorized a long distance telephone system
34 within and through said city, and that said con-
struction and decision by said State Court is res
adjudicata and conclusive of this question against plain-
tiff, and it cannot be heard upon the same question in this
suit. Said Ordinance No. 180 is as follows:

"An ordinance to grant permission to the Dakota
Central Telephone Lines (Inc.), their successors or as-
signs, the right to erect poles and fixtures, and to string
wires, for the purpose of operating a long distance tele-
phone system, within and through the city of Mitchell,
South Dakota.

Be it ordained by the city council of the city of
Mitchell, South Dakota.

Section 1. That there is hereby granted the right
and privilege, given to the Dakota Central Lines (Inc.),
their successors or assigns to erect poles, and string wires

on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception however, not to prohibit the crossing of Main, Park Avenue, Fourth and Fifth Streets, at right angles, where it is necessary, and maintaining the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of the City of Mitchell, and the

35 public in general, facilities to communicate with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said City of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell, reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above

36 company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect from and after the date of its passage and approval.

Passed June 6th, 1904; approved June 7th, 1904.

GEO. A. SILSBY, Mayor.

J. G. MARKHAM, Auditor."

(d) It affirmatively appears from the record and is undisputed that notwithstanding said ordinance No. 180, plaintiff continued to operate and maintain its local telephone exchange within the defendant city from the date of the passage of said Ordinance No. 180, to-wit: June 7, 1904, under the authority of said Ordinance No. 135 and paid the gross earnings tax imposed thereby, and otherwise complied therewith until the expiration of all of the rights granted thereby, to-wit: May 11, 1913, and the plaintiff thereby placed a practical construction upon said ordinance, as well as Ordinance No. 180, to the effect that said Ordinance No. 135 granted the right to own and maintain only a local telephone exchange within the defendant City, and that said Ordinance No. 180 granted authority only to maintain and operate a long distance telephone exchange; that the interpretation of said Ordinance so adopted by plaintiff was determined by the Supreme Court of South Dakota, in the
37 case of City of Mitchell vs. Dakota Central Telephone Company, supra, and that the rights of plaintiff under said Ordinance, and particularly No. 180 were found and conclusively determined in said action, and the same became res adjudicata of said question, and plaintiff is bound thereby and estopped from urging the same question in this action, and Federal Courts are bound by the interpretation of said Ordinance adopted by said State Supreme Court.

(e) That plaintiff is precluded and estopped by the decision of said Supreme Court in the case of City of Mitchell vs. Dakota Central Telephone Company, supra, from urging in this Court the repeal of said Ordinance No. 135, by the Resolution adopted by the defendant City, April 10th, 1907, because:

1. Said Resolution did not in effect repeal, or pretend to repeal said Ordinance No. 135, but simply granted plaintiff permission to place its wires underground when and where conditions required.

2. Said Resolution was not of equal dignity with said Ordinance No. 135 and could not operate as a repeal of said Ordinance.

3. The State Supreme Court in the case above cited, decided that said Resolution did not operate as a repeal

38 of said Ordinance No. 135 and that decision was and is res adjudicata as against plaintiff, and plaintiff is estopped from raising that question in this action; that the decision of said Supreme Court should be respected and followed by Federal Courts.

Said Resolution of April 10th, 1907 is as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors and assigns, to place, construct and maintain, through and under the streets, alleys and public grounds of said city such conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general, communication by telephone and other improved appliances."

THIRD

That said District Court erred in adjudging and entering its decree that said resolution of March 17th, 1913, was and is unconstitutional and void, and impairs the obligations of a contract between the parties thereto, contained in said Ordinance No. 180, in violation of Section 10, Article 1, of the Constitution of the United States, and that it deprives plaintiff of property without due process of law, in violation of Section 1, of the Fourteenth Amendment of the Constitution of the United

39 States, for all of the reasons stated in assignments numbered First and Second herein.

FOURTH

That said District Court erred in enjoining and restraining the defendant City, its officers, agents, attorneys and servants from interfering with the poles, telephone lines and telephone exchange now owned and operated by plaintiff in the defendant City, because such injunction unjustly interferes with the exercise of the police power of the defendant city, and unjustly deprives it of the right to impose reasonable conditions and burdens upon the plaintiff's right to operate and maintain any local telephone exchange within said City.

FIFTH

The Court erred in admitting the testimony given by N. L. Lane, as hereinafter set out, over defendant's objection that such evidence was incompetent, irrelevant and immaterial in that it is an attempt to construe the meaning of the ordinances involved in this action by oral extrinsic evidence and that the meaning, scope and effect of such ordinance cannot be proved by such evidence. The evidence objected to as above, is as follows:

"When I first engaged in the telephone business the 'Blake Transmitter' was in use, the transmitter is that portion of the telephone which the user speaks into when using the telephone. The Blake transmitter consisted of a carbon button, a platinum point and a diaphram and was found to be an efficient transmitter for transmitting messages a short distance, that is 20, 25 or 30 miles. This instrument was in general use in local exchanges from 1889 to about 1904 or 1905. The type of transmitter now in use is what is known as the 'long distance' transmitter, or 'solid back.' This transmitter was put on the market in 1893 at which time it began to be substituted for the Blake transmitter, but this substitution did not become general until about 1896, 1897 or 1898 in the entire United States, and in some localities it was in general use before that date. The solid back transmitter was used for long distance business and as soon as its increased efficiency became generally known it was substituted for the old transmitters as rapidly as the manufacturers could produce them, both in local and long distance work. This change was made between 1896 and 1904 or 1905. At first higher rate was paid for the use of the 'solid back' transmitter than for the old type."

SIXTH

The Court erred in overruling the defendant's objection to the following question asked of M. L. Lane, to-wit:

"Q. With the Blake transmitter what was 41 the custom with reference to the subscriber in using the toll lines with reference to the telephone from which he would talk?"

This was objected to as incompetent, irrelevant and immaterial, for the reason it don't tend to prove any of the issues in this case, for the further reason that no proper foundation has been laid, and it don't appear that the defendant is in any way bound by this custom; and for the further reason that it seeks to interpret the ordinance in question, in this litigation, by oral and extrinsic evidence outside of the ordinances themselves. Objection overruled. Exception allowed.

"A. Both the representatives of the company and the subscribers, from actual experience, knew that it was impossible to carry on a satisfactory conversation for a considerable distance with this transmitter. And after installation of the solid back transmitter, the subscriber, in preference to attempting to talk through this transmitter, would come to the central office, or to such point as the company had located one of its long distance transmitters, and use the long distance transmitter or solid back in the place of the Blake for a long distance conversation."

SEVENTH

The Court erred in overruling defendant's objection to the following question asked of the witness, M. L. Lane, to-wit:

"Q. Now, this solid black transmitter you
42 have spoken of, what was the trade name by which
such instrument was generally known among the
telephone people?"

Mr. Miller: Objected to as incompetent, irrelevant and immaterial and not tending to prove any of the issues in this case and no proper foundation has been laid for it and for the further reason it don't appear that the trade name of this instrument was taken into consideration at the time of the passage of the ordinance in litigation; and for the further reason it is in no way binding on this defendant, and that it is a mere attempt to prove the meaning, scope and effect of the ordinances of the City of Mitchell involved in this litigation, by oral and extrinsic evidence outside of the said ordinances themselves, and that this is not the proper method of proving such meaning, scope and effect. Objection overruled. Exception allowed.

"A. Long distance transmitter."

EIGHTH

The Court erred in overruling the defendant's objection and in admitting the testimony hereinafter stated as given by Charles E. Hall over the defendant's objection that it was incompetent, irrelevant and immaterial, and for the further reason that no proper foundation has been laid and that it is not binding on the defendant; and for the further reason it is an attempt to prove the scope, meaning and effect of the ordinances involved in this litigation by oral and extrinsic evidence outside of the ordinances themselves and this is an improper method of proving such meaning, scope and effect of such ordinances. Objection overruled. Exception allowed. The evidence objected to was as follows:

"The early telephone instruments were equipped with magneto calls, transmitters, receivers and batteries. The Blake transmitter was in use in 1884, until June, 1905, more or less; their use gradually diminished along toward 1905, when none or very few were used. The capacity as to distance of the Blake transmitter depended upon the condition and character of the line, perhaps it was not over 50 or 75 miles over good iron lines. Long distance lines were generally constructed after 1894, and copper wire came into use in 1889, which would carry messages longer distances than the iron wire. The 'solid back' transmitter did not come into extended use until about 1901 or 1902. They were first introduced in toll line business in 1893 and 1894. Prior to the time when the solid back came into general use, the subscriber had difficulty in talking up to 100 or more miles and he would generally go to the central office or long distance 44 to talk, but after the solid back transmitter had been furnished, the subscriber was generally able to talk over long distance from his office.

The subscribers of the Iowa Telephone Company prior to 1904, were supplied with the 'solid back' or long distance transmitters as rapidly as the transmitters could be secured, and the rental charges for these were generally greater than for the Blake transmitters. During the

time from 1893 to 1904 the 'solid back transmitter' went under the trade name of 'long distance telephone.'

NINTH

The Court erred in overruling defendant's objection to, and in admitting the testimony hereinafter set out as given by J. L. W. Zeitlow over defendant's objection that such evidence was incompetent, irrelevant and immaterial; that it does not tend to prove any of the issues in this case, and that it is in no way binding upon the defendant; that no proper foundation has been laid, and for the further reason that it is an attempt by oral and extrinsic testimony to prove the meaning, scope and effect of such ordinance, and that the language of ordinances themselves is the only evidence of such meaning, scope and effect, and for the further reason that the meaning, scope and effect of such ordinance has been heretofore determined by the Supreme Court of the State of
45 South Dakota. Objection overruled. Exception allowed.

The evidence objected to is as follows:

"The Blake transmitters were in common use from 1883 to 1905 and 1906. That is, they were used principally in the earlier period and gradually disappeared in the latter. They were used principally in telephone exchanges in short lines. The solid back transmitter was patented in 1892 by Anthony C. White. They were first used for long distance purposes and were gradually put in service in local exchanges, the first I knew of it from 1890 to 1896, and from that time on they were substituted as far as they could be had. Prior to the time they came into general use, they were sometimes supplied specially to subscribers who wanted special or better service over long distances. These solid back instruments were known by the trade name of 'long distance telephone instruments.' A successful conversation could be heard through the Blake transmitter from a distance of 25 to 100 miles according to the other conditions of the line and construction; with a solid back, you could talk over a thousand miles. My company began to install the solid back transmitter for general use in local exchanges from 1898 to 1906. I mean by that, that we after that time did

46

not use any other transmitter. I was president of the Dakota Central Telephone Lines Company in 1904."

TENTH

The Court erred in overruling defendant's objection to the following question propounded to J. L. W. Zeitlow:

"Q. How are they classed with reference to long distance telephones or otherwise?"

Mr. Miller: That is objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness; that it don't tend to prove any of the issues in this case, and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances No. 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has construed the meaning, scope and effect of such ordinances contrary to the contention of plaintiff in this action. Objection overruled. Exception allowed.

47 "A. They are long distance transmitters and telephones. There are approximately between eleven and twelve hundred subscribers to the local exchange in Mitchell and about one-fourth of them are business telephones. The subscriber secures connections with the toll lines by inserting the finger in the place called 'long distance' and rotating the dial to the stop and then letting the dial work back, and then the long distance operator puts the subscriber in connection with his party."

ELEVEN

The Court erred in overruling defendant's objection to the following question propounded to the witness John Osteline, to-wit:

"Q. While you were in Minneapolis, were there any Blake transmitters in use at that time?"

Mr. Miller: This is objected to as incompetent, irrelevant and immaterial; that it don't tend to prove any of the issues in this case and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances No. 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason
that the Supreme Court of the State of South Da-
48 kota, has construed the meaning, scope and effect
of such ordinances contrary to the contention of
the plaintiff in this case. Objection overruled. Excep-
tion allowed.

"A. No, sir, there was not; not to my knowledge
there was not.

The witness further testified over the same objection as above, that the transmitter in use at that time was called the solid back long distance transmitter and that in the early days the instrument was designated as the "Blake Transmitter" and "Long distance transmitter", and many called it the "solid back."

TWELFTH

The Court erred in sustaining the complainant's ob-
jection to the following question propounded to witness,
George E. Foster, for the defendant:

"Q. What do you understand by long distance tele-
phone?"

Objected to as immaterial and incompetent. Ob-
jection sustained. Exception allowed.

"A. My understanding of a long distance telephone
was to connect different towns in different parts of the
state, so as to talk with people outside of Mitchell."

THIRTEENTH

The court erred in sustaining the complainant's ob-
jection to the following question propounded to George
E. Foster, witness for the defendant:

"Q. That is what you understood by the term 'long distance' telephone at the time of the passage of this ordinance?"

Objected to as incompetent and immaterial and could not be received to interpret the ordinance. Objection sustained. Exception allowed.

"A. That is what I understood."

FOURTEENTH

The Court erred in sustaining the complainant's objection to the following question propounded to A. J. Kings, witness for the defendant:

"Q. You may state what your understanding is of the term 'long distance'?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. I understand it is a line running from different towns and connecting the different towns in the country."

FIFTEENTH

The Court erred in sustaining complainant's objection to the following question propounded to A. J. Kings, as witness for the defendant:

"Q. Did you so understand the term 'long distance' telephone at the time this ordinance was passed?"

Objected to as immaterial and incompetent.

50 Objection sustained. Exception allowed.

"A. Yes, as connecting different towns around."

SIXTEENTH

The Court erred in sustaining the complainant's objection to the following question asked of defendant's witness, A. J. Kings, to-wit:

"Q. You may state whether or not at the time this ordinance No. 180 was passed, you intended as a member of the City Council to grant a franchise to the Dakota Central Telephone Lines for the purpose of constructing and operating a local exchange in the City of Mitchell, South Dakota?"

Objected to as incompetent and immaterial for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. I did not understand it as a local exchange. We already had one."

SEVENTEENTH

The Court erred in sustaining complainant's objection to the following question propounded to the witness, J. E. Wells for the defendant:

"Q. State what you understand by the term 'Long distance'?"

Objected to as incompetent and immaterial and no foundation laid for it. Objection sustained. Ex-
51 ception allowed.

"A. It is a telephone connection from one town to another."

EIGHTEENTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells for the defendant:

"Q. That was your understanding of that term 'long distance telephone' at the time these ordinances were passed, was it?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. That is the way I remember it."

NINETEENTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"Q. As far as you remember, Mr. Wells, did you intend at the time you voted for these ordinances to grant to the Dakota Central Telephone Lines a franchise for the purpose of owning and operating a local telephone system or exchange in the City of Mitchell?"

Objected to as immaterial and incompetent and cannot be received for inferring the interpretation of ordinances. Objection sustained. Exception allowed.
52 "A. It wasn't my idea at the time."

TWENTIETH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"A. Your understanding was that they were simply getting a long distance franchise to connect the city with places outside the city by telephone?"

Objected to as incompetent, immaterial and cannot be received for the purpose of inferring the interpretation of the ordinance. Objection sustained. Exception allowed.

"A. Yes, sir."

TWENTY-FIRST

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. What do you understand by the term 'long distance telephone'?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. Long distance would be to telephone to places outside of the city—to other towns."

53 TWENTY-SECOND

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"A. Was that the understanding you had of the term 'long distance' at the time these ordinances were passed?"

Objected to as immaterial and incompetent for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. Yes, sir, that was my understanding at that time, that it was for long distances to connect with other towns and people at a long distance."

TWENTY-THIRD

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. Did you intend as a member of the City Council in voting for the passage of Ordinance No. 180 to grant to the Dakota Central Telephone Company the right and privilege of owning and operating a local tele-

phone system or exchange within the City of Mitchell, South Dakota?"

54 Objected to as immaterial and incompetent and inadmissible for the purpose of interpreting the ordinances. Objection sustained. Exception allowed.

"A. I didn't vote with the understanding that they were to have any local telephone. It was long distance. What the ordinance called for was long distance and communication outside of the city."

TWENTY-FOURTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Mr. Silsby, what do you understand by the term 'long distance telephone'?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. The facilities for connecting between points or between different towns and cities."

TWENTY-FIFTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Did you understand that if I 'phoned from the office up to your office at the Elks that that would be a long distance telephone or do you mean to say the points should be in different localities or towns?"

55 Objected to as immaterial and no proper foundation has been laid for it. Objection sustained. Exception allowed.

"A. Generally speaking, I should understand it as between different towns."

TWENTY-SIXTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Was that the understanding you had of 'long distance telephones' at the time you signed these two ordinances I have heretofore mentioned?"

Objected to as incompetent and immaterial, and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. I think it was. That was my understanding at that time."

TWENTY-SEVENTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Then as far as you know that was the understanding of the other members of the council, was it not?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained.
56 Exception allowed.

"A. I think that that was the sense of the council."

TWENTY-EIGHTH

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. In the passing of these ordinances the City Council at the time, as you understand it, did not intend to grant a franchise to the Dakota Central Telephone lines to own and operate a local telephone or exchange in the City."

Objected to as immaterial and incompetent and cannot be received for the varying of the interpretation of the ordinances.

the ordinances. Objection sustained. Exception allowed.

"A. No, sir."

ARGUMENT

Jurisdiction

The jurisdiction of this Court to entertain this suit necessarily depends upon the Court's answer to the following question: Has the State of South Dakota, or the City of Mitchell enacted any law which tends to impair the obligations of any contract with the plaintiff, or which deprives it of property without due process of law?

57 It is alleged in the nineteenth paragraph of the Bill of Complaint, that the "TELEPHONE RESOLUTION" set out in the fourteenth paragraph of the Bill, adopted and approved March 17, 1913, has that effect. The allegations of the Bill with reference to the inter-state character of the plaintiff's business are wholly immaterial and irrelevant to the question of jurisdiction because:

1. No question of regulation of inter-state rates or inter-state telephone traffic is in any manner raised by the pleadings.

2. Neither the reasonableness of the rates nor any regulation of inter-state business is called into question.

3. Neither Congress nor the Inter-state Commerce Commission, under any authority conferred upon it by the Inter-State Commerce Act, have assumed to regulate or in any manner control the rates of business of inter-state telephone companies operating in South Dakota.

4. The State of South Dakota has conferred upon its Railway Commission, the power to fix telephone rates in South Dakota, by Chapter 207 of the laws of 1913 (Sec. 20, page 307), and the record discloses that on the 17th day of March, 1913, prior to instituting this suit, complainants applied to the Board of Railway Commissioners to adopt the schedule of rates proposed by complainants, governing complainant's business with-

58 in the the City of Mitchell. *Transcript of Record,* page 77.

What obligation of the City of Contractual right of the plaintiff was violated by said resolution?

The "Telephone Resolution" after recognizing the rights and privileges conferred by Ordinance 135, upon plaintiff's predecessor and after reciting that plaintiff, "has failed and refused to accept the terms and conditions of Ordinance No. 305, of the City of Mitchell, granting to said Dakota Central Telephone Company, the privilege to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, for a period of twenty years from and after said 11th day of May, 1913, declares:

"Now, therefore, be it resolved, by the City Council of the City of Mitchell in special session assembled, duly

and regularly called this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913, and

Be it further resolved, that said Dakota Central Telephone Company shall have no right and privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 59 1913." *Transcript of Record, pages 74-75.*

Further provisions of the resolution notify and request the plaintiff on and after May 11, 1913, to remove its poles, wires, etc. from the streets and public grounds of Mitchell, and that unless it complies with the provisions of said resolution the defendant "*will take such steps as may be necessary* to secure the immediate removal of said poles, etc."

What more was this resolution than a mere notice to the plaintiff of the expiration of its right to maintain a local telephone exchange in the City of Mitchell, and that it must remove its local telephone equipment on and after May 11th, 1913?

"It is no longer open to question that the by-laws or ordinances of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, *having the force of law within the limits of the municipality*, that it may properly be considered as a law, within the meaning of this Article of the Constitution of the United States."

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142-148. (45 L. R. A., 788-791.

Conceding, as we must, that an ordinance regularly enacted by an incorporated city, has the force of 60 law within the meaning of the Federal Constitution, it is not open to question in South Dakota that a mere resolution adopted by a City Council has the effect to change or repeal an ordinance.

City of Mitchell vs. Telephone Company, 25 S. D., 409-420.

The Supreme Court of South Dakota in that case adopted the rule announced in the text-books, as follows:

"The Act which repeals a law must be of equal dignity with the Act which establishes it, hence, an ordinance can be repealed only by another ordinance and not by resolution or motion."

"A repeal cannot be effected by mere resolution or motion or by a void ordinance, but must be enacted in the manner required for passing a valid ordinance."

That the action of the City Council of defendant city complained of by complainant was a resolution although inadvertently designated as an ordinance in the pleadings, we do not think will be disputed by counsel for complainant. The form and wording of this instrument shows that it is a resolution, it is stipulated that it was a resolution. Transcript of Record, page 74, and the trial judge in his opinion designates it as a resolution. *Transcript of Record, page 51.*

There is a great deal of difference between
61 an ordinance and a mere resolution passed by a
city council in South Dakota.

City of Mitchell, et al vs. Dak. Cen. Tel. Co., 25 S. D.,
409.

"The yeas and nays shall be taken upon the passage of all ordinances, and for the passage of any ordinance it shall require the affirmative vote of a majority of all the aldermen elect, * * *" Sec. 1209, Revised Political Code of 1903, of South Dakota.

"All ordinances shall be read twice, and there shall be at least one week intervene between the first and second reading; and after thus being passed by the City Council shall, before they take effect, be deposited in the City Auditor for the approval of the Mayor, * * *" "Provided, further, that all ordinances so passed by the council and signed by the Mayor, or passed over the Mayor's veto shall be published at least once in the official newspaper of the city, * * *" "The City Auditor shall record in a book kept for that purpose, together with the affidavit of the publisher all such ordinances so passed and published. * * * They shall be styled: 'Be it ordained by the City Council.'" Section 1213, Revised Political Code of 1903, of South Dakota.

62 “When by this chapter the power is conferred upon the City Council to do and perform any act or thing, and the manner of exercising the same is not specifically pointed out, the City Council may provide by ordinance the details necessary for the full exercise of such power.” Section 1380, Revised Political Code of 1903, of South Dakota.

A mere resolution of the City Council in pursuance of a given power does not meet the requirements of N. D. Rev. Codes, Sec. 2223, that the manner of exercising a given power, when not expressly pointed out may be by ordinance.

Engstad vs. Dinne, 8 N. D. 1, 76 N. W. 292.

It is thus seen that there is considerable difference between an ordinance and a mere resolution. The passage of an ordinance is an exercise of the legislative power while the passage of a resolution is ordinarily an administrative act. The resolutions in question did not and could not have the force and effect of law. They could not be enforced in the manner that a law or ordinance is generally enforced. There was no penalty attached to their violation and if they were disregarded, and legal proceedings were instituted by the city, such proceedings would not and could not be based upon such resolutions or their violation, and in such a suit, such resolutions could not be introduced as evidence to prove the city's contentions, except possibly on the question of

63 estoppel if that were raised. They are therefore nothing more than a mere statement of the City's position on the points in controversy. Can it be said that such a statement by the City Council violates the obligation of any contract so as to vest the Federal Courts with jurisdiction every time such a controversy arises.

But grant for the sake of argument, that the resolution had the force of an ordinance, it impaired no existing right of the plaintiff, deprived it of nothing without due process of law, and amounted to nothing more than notice by the City to the Telephone Company that its right to maintain and operate a local telephone exchange in the City would cease with the expiration of the rights conferred by Ordinance No. 135.

In other words, it was nothing more than a formal declaration of the City's position with reference to the controversy with the plaintiff in relation to the latter's rights under Ordinance No. 180.

St. Paul Gas & Light Co., vs. St. Paul, *supra*.

In the St. Paul Gas Light case, the court was considering the effect of an ordinance regulating the business as such by the City Council of Minneapolis, wherein the Gas Company was commanded to,

64 "Forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the board of public works."

And the declaration on the part of the City Council that they would not thereafter pay the Gas Company interest on the cost of the construction of the lamps which it was directed to remove, under the provisions of the Ordinance 1856, which granted the Gas Company power to construct the plant and supply the City and its inhabitants with illuminating gas, and in that action the Gas Company sought to enjoin the City from carrying into effect the latter Ordinance, and the Supreme Court held that the Ordinance complained of did not have the effect of impairing the obligations of the prior contract created by the Ordinance of 1856.

The pertinent part of the opinion of Mr. Justice White is as follows:

"If, then, there be any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions referred to. Now, it is apparent that the command given by the city to the Gas Company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of 65 the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligations remained wholly untouched by the order of removal. This being

true, the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provisions of the ordinance that the same result must follow. The other provision in question created no new right nor imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the City to enforce what it conceived to be its rights under the contract.

66 When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error."

"The formal repudiation by a municipality of its contract with a Water Works Company and its refusal to perform its obligations under it, cannot give rise to a suit under the Federal Constitution and the Court cannot take jurisdiction without reference to the citizenship of the parties."

Dawson vs. Columbia Co., 197 U. S., page 178; 49 L. Ed. 713.

The jurisdiction of the Federal Court of a suit by a street railway company to enjoin the enforcement 67 of a municipal ordinance as impairing the contract rights, cannot be sustained where such ordinance after reciting that question as to the Company's rights have been raised and orders it to remove its tracks and directs the city solicitor to take action to enforce the city's position, since such jurisdiction must contemplate enforcement by the city and not forceable removal of the tracks.

City of Des Moines vs. Des Moines City Railway Co., 214 U. S. 179; 53 L. Ed. 958.

In Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517-530 (48 L. Ed. 1102-1106) it was said:

"To constitute the impairment of a contract within the sense of the constitution, it is correctly argued, requires that some subsequent action by the state or under its authority should have been given effect as against the contract."

It was there held that intervening ordinances superseded the original ordinance of 1879, and that the ordinance of 1898 reducing the fare to four cents, impaired the right to charge five cents, conferred by the intervening ordinances which authorized the consolidation of the street car companies. There was clearly a violation of existing contractual rights in that case.

Hamilton Gas Light Co. vs. City of Hamilton, 68 146 U. S. 258; 36 L. Ed. 963-967.

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against the state laws impairing the obligation of contracts. * * * "

"Nor does every statute which affects the value of a contract impair its obligations. It is one of the contingencies which parties take now in making a large class of contracts, that they may be affected, in many ways by state and national legislation." Quoted from Curtis vs. Whitney, 80 U. S. 13; 20 L. Ed. 513-514.

"If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that *public grants, susceptible of two constructions, must receive the one most favorable to the public.*"

To sustain the jurisdiction of this court, plaintiff's counsel have cited the case of Iron Mountain Railway Co., vs. City of Memphis, 37 C. C. A. 435; 96 Fed. 113.

A careful examination of Judge Taft's opinion will show that the case involved a situation different than the one disclosed by this record. We do not question the rule announced in that opinion, to the effect that a city ordinance or resolution having the force of law, within the statute may have the effect of violating the obligations of an existing contract, or violate the 69 Fourteenth Amendment of the Constitution, by depriving a person of property without due process of law. We have heretofore quoted the words of Mr. Justice White in the St. Paul Gas Company case, which clearly express that principle. The points we make here are:

1. That this telephone resolution has not the dignity or force of law as would impair the obligations of an existing contract, or deprive plaintiff of any process of law, and in support of this we cite, City of Mitchell vs. Telephone Company, 25 S. D. 409-420.

2. Conceding for the purpose of argument, without admitting it, that the resolution in question has the force of law, still it does no more than declare the city's position upon the question at issue, and impairs no vested right, nor deprives it of anything it already possessed.

The distinction between the provisions of the resolution and the one under consideration in the Iron Mountain case; that is to say, the reason for the application of the rule contended for by the plaintiff in the latter, while it should not be applied to our case, is clearly pointed out by Mr. Justice Holmes in Des Moines vs. Des Moines City Ry. Co., *supra*.

"We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore the jurisdiction of the circuit court cannot be maintained.

70 Leaving on one side all question as to what can be done by resolution, as distinguished from ordi-

nance, under Iowa laws, we read this resolution as simply a denial of the appellee's claim, and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right."

The opinion of Judge Taft is replete with expressions to the effect that the resolution in that case commanded the police force to take possession of the company's property; the following expressions clearly indicate that:

"The averment of the bill was that the council passed a resolution of forfeiture, and of the declaration of its purpose to take possession of the street, *intending to use the police force in enforcing such declaration.*"

71 "The Court below held, and, we think, rightly, that whether the action of the railroad company with reference to rights was a breach of the condition, and justified a forfeiture or not, an attempt by the city, through a resolution by its legislative council declaring the forfeiture on that account, and the *forcible taking possession*, would *together* constitute the taking of property of the railroad company without due process of law."

"Such forfeiture clauses always provide that upon the breach of the condition, the lessor or the grantor may re-enter upon the premises, and have the same in his former estate; but it would be novel law to hold that under such a clause the lessor or grantor might rightfully *by force and arms* repossess himself of the estate, after a breach of the condition, if such repossession were resisted by the lessee or grantee. In Railroad Co. vs. Johnson, 119 U. S. 608, the Supreme Court laid down the rule which has been common law ever since the statute of

5 Rich. II, and was probably then only declaratory of the law that a lessor entitled to possession may acquire such possession by *lawful* entry, but that entry by *force* is not lawful."

"In such cases as the present, where resistance would create a riot, and lead to irreparable injuries so frequently resulting therefrom, equity will enjoin the
72 *threatened use of force* without respect to the question who has the right of possession." (Page 124.)

"With respect to the occupancy of a street, however, which it controls by virtue of being an agent of the state, and a trustee for the public, its action in depriving persons having vested property rights in the street will, if *without due process of law*, be state action, within the inhibition of the fourteenth amendment. For our present purpose it is not important whether this threatened taking possession of a street under a resolution *by force* is to be regarded as legislative or executive action, for either, as we have seen, is within the inhibition of the clause of the first section of the fourteenth amendment, which forbids a state to deprive a person of his property without due process of law." (Page 125.)

These excerpts from the opinion clearly show that the element of force contemplated by the resolution in question was the controlling influence of the court upon the question of jurisdiction; that is, that it was the element of force contemplated by the resolution which the court thought deprived the company of its property without due process of law. In our case, as we have seen, the resolution notified the plaintiff company of the expiration
73 of its rights under Ordinance 135, and that unless it removed its poles, etc., the city "would take such steps as might be necessary to secure the immediate removal of said poles, etc."

There is nothing in our resolution, suggesting the use of force, or violence, or a riot, or as Mr. Justice Holmes puts it, that the city should take a posse and begin to pull up the poles.

If it should be contended that Judge Taft's opinion is not to be distinguished from the other cases, then it is

clearly in conflict with the views expressed by the Supreme Court and it must yield.

It is therefore respectfully submitted that no occasion exists in the present case for the exercise of Federal Jurisdiction and that the trial court erred in assuming such jurisdiction.

ORDINANCE NO. 180.

Aside from the question of jurisdiction, the main question for determination in the present case is whether or not Ordinance No. 180 of the City of Mitchell, gave to complainant a franchise to construct, operate and maintain a local telephone exchange in the City of Mitchell. The complainant contends that this ordinance gave it such rights, while the defendant claims that the ordinance

in question gave to complainant, only the right to
74 construct and maintain a long distance telephone system as distinguished from a local exchange, and that the only right complainant had to operate and maintain a local exchange in said city was the right given in Ordinance No. 135. The defendant makes no claim to any right to remove the long distance system from the City but it is only the local exchange the defendant claims the right to disturb. By the term "local telephone exchange" as used in this brief is meant only those telephone wires, cables, poles, instruments and fixtures used in giving to the citizens of the defendant city facilities to communicate with each other by telephone within the corporate limits of the city, while by the term "long distance telephone" as used herein is meant only such lines whereby persons in the City of Mitchell can communicate by telephone with people outside of the corporate limits, or whereby people outside of the City can communicate with people residing within the city.

In support of defendant's contention that Ordinance No. 180 gives to complainant the right to operate and conduct only a long distance telephone system within and through defendant city, we desire to submit three general propositions, viz:

1. That the language of the ordinance requires such interpretation to be placed upon it.

75 2. That the circumstances surrounding its passage and the interpretation originally placed

upon the ordinance by both the complainant and the defendant strongly supports the defendant's contention.

3. That the Supreme Court of South Dakota, has determined the question in defendant's favor and such decision is binding upon this court.

Language of Ordinance No. 180

On this point, the Language of Ordinance No. 180, we desire to call the Court's attention to a few cardinal rules of interpretation.

"A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor."

Sec. 931, Revised Civil Code of 1903, South Dakota.

Municipal ordinances must be strictly construed against the party claiming the grant.

State ex rel Northwestern Tel. Ex. Co. vs. City of Thief River, et al, 113 N. W. 1057, Minn.

"Words used in any statute are to be understood in their ordinary sense except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained."

Sec. 2443, Revised Civil Code of 1903, South Dakota.

"In the construction of a statute, the particular inquiry is not what is the abstract force of the words used, or what they *may* comprehend, but in what sense they were intended to be used as they are found in the act."

Lawrence County vs. Meade County, 6 S. D. 528, 62 N. W. 131.

The fundamental rule of interpretation applied to statutes, mandatory as well as directory, is that words in a statute, if of common use, are to be taken in their natural and ordinary sense, *without any forced or subtle construction* to limit or extend their import.

Landauer, et al vs. Conklin, et al, 3 S. D. 462, 54 N. W. 322.

If these rules are fairly applied in the interpretation of the ordinance in question there can be no escape from the interpretation contended for by defendant. If there is any doubt as to the scope of the grant contained in Ordinance No. 180, it must be construed strictly

against the complainant, but to give it the construction claimed by complainant would be reversing the rule and construing it strictly against the defendant, the grantor.

The term "long distance telephone" is not given a special construction by the South Dakota statutes, hence under Section 2443, Civil Code, they must be understood in their "ordinary sense", unless a contrary in-

77 intention *plainly appears*. They must be taken in their "natural and ordinary sense without any forced or subtle construction to limit or extend their import." That the term "long distance telephone" is in common use is well recognized.

City of Mitchell vs. Dakota Central Telephone Co.,
25 S. D. 409; 127 N. W. 582.

State ex rel Northwestern Tel. Ex. Co. vs. City of Thief River Falls, et al, 113 N. W. 1057 (Minn.)

In construing a statute the intention of the legislature is to be collected from the words they employ and the intention is to be found "in the language actually used, interpreted according to its fair and obvious meaning."

Johnson vs. Southern Pac. Co., 196 U. S. 1.

United States vs. Harris, 177 U. S. 305.

The fair meaning of a statute must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the Court, would yet pretty plainly be beyond the limitation contained in the statute.

United States vs. St. Anthony Ry. Co., 192 U. S. 524.

Where a statute is expressed in plain and unambiguous terms, the legislature should be intended to mean what they have plainly expressed, and consequent-
78 ly no room is left for construction.

Northern Securities Co. vs. United States, 193 U. S.
197.

St. Paul Etc. R. Co. vs. Phelps, 137 U. S. 528.

Insurance Co. vs. Ritche, 5 Wall 541.

State Tonnage Tax Cases, 12 Wall, 204.

United States vs. Graham, 110 U. S. 219.

The legislative meaning is first to be sought in the words they have used, and if clear the letter of the law controls.

United States vs. Gooding, 12 Wheat, 460.

Lake County vs. Rollins, 130 U. S. 662.

Scott vs. Reid, 10 Pet. 524.

Pine vs. Chicago Title Etc. Co., 182 U. S. 438.

New Lamp Chimney Co. vs. Ansonia Brass, etc. Co.
91 U. S. 656.

Knights Templars, etc. Co. vs. Jarman, 187 U. S. 197.

White vs. United States, 191 U. S. 545.

"It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the Court to do so."

Bate Refrigerating Co. vs. Lutzberger, 157, U. S. 1.

The primary and general rule of statutory construc-
79 tion is that the intent of the lawmaker is to be
 found in the language he has used.

United States vs. Goldenberg, 168 U. S. 95.

Then what is the natural and ordinary meaning of this term? Can it be said to be the technical and restricted meaning sought to be adopted by the complainant? The very fact that complainant has felt it necessary to bring telephone experts from different parts of the middle western country to prove that a certain improved telephone transmitter was sometimes called a long distance telephone is proof in itself that the natural and ordinary meaning of the term under discussion is not as claimed by complainant. Why did not complainant go out upon the streets of defendant city or any other city and call in men to testify on this point? Simply because ninety-nine out of every hundred and probably more, would testify that they understood the term in the same sense as the defendant herein. So defendant insists that all of the evidence introduced by the complainant on the technical construction of telephone transmitters and their technical and trade names is but added proof that the term "long distance telephone" as used in Ordinance No. 180, should be construed to mean a telephone whereby communication may be had from one community to another, or from one town to another.

Complainant seeks to place a "*forced and subtle*" construction on the term, in order to ex-

tend its meaning. This is in direct conflict with the rule laid down in Landauer, et al, vs. Conklin, et al, 3 S. D. 462, 54 N. W. 322.

It may be argued that the use of the term "within and through" in the title of the ordinance shows an intention to grant a local franchise. This does not necessarily follow, and to our mind the use of the word "within" does not in any way support plaintiff's contention. It is not necessary to discard this word either. If long distance lines are to run through the city, what would be more natural than to say "within and through" for certainly the line could not run "through" the city without also running "within" the city. The two words must be taken together as a unit and so taken the use of the word "within" is no evidence of an intent to give a local franchise. Had the ordinance read "within or through" then such argument might have some weight.

Again, it will be contended that the insertion of the word "in" in the clause "for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing *in*, near or at a distance from Mitchell," shows an intention to give a local franchise.

In the first place, if the council intended to grant a local franchise, why was the term "long distance telephone" employed, both in the title and in the granting part of the ordinance? It surely was not necessary to use this term in order to secure the installation of the latest improved transmitter. It certainly seems strange that the ordinance should specifically describe a long distance telephone and then in order to show that the ordinance did not mean what it said, the word "in" should be employed to neutralize the language preceding it. Again, if by the term "long distance telephone" the so-called solid back transmitter only was meant, what would be the necessity of inserting the word "in"?

Because Ordinance No. 174, did not contain the word "in", it will be argued that the insertion of this word in Ordinance 180 has some important and magic significance. This does not necessarily follow, when we remember that it is the intention of the City Council that

must be ascertained and not the secret thoughts in the mind of Mr. Zietlow, the president of the plaintiff company. The Court's attention is called to the stipulated fact that the plaintiff company at the time Ordinance No. 174 was passed, was maintaining long distance telephone lines within and through the city without any consent from the city.

82 It was not lawful for complainant to maintain and operate the long distance lines within the City of Mitchell without the consent of the municipal authorities thereof.

Art. X, Sec. 3, South Dakota Const.

Subd. 7, 9, 10, 17, Sec. 1229, Revised Pol. Code of South Dakota.

City of Mitchell, et al vs. Dakota Central Tel. Co., 25 S. D. 409, 127 N. W. 582.

Ordinance No. 180 was evidently passed to take the place of Ordinance No. 174, and we must assume that it was passed for the same purpose, viz: to give permission to maintain and operate the long distance telephone lines already constructed and to give permission to construct other long distance lines within and through said city.

In regard to the word "in" it seems to us that the logical construction would be to construe the word "in" as used in Ordinance No. 180, for the purpose of giving the "public in general," that is, the public outside of Mitchell, as distinguished from the people in Mitchell, facilities to communicate by long distance telephone with people residing *in* Mitchell, just as we must construe the purpose of the ordinance to be to give facilities to citizens

83 *in* Mitchell to communicate by long distance telephone with persons residing "*near or at a distance from Mitchell*," for it cannot be said that one of the purposes of the ordinance was to give to the public in general or people living outside of Mitchell facilities to communicate with each other.

In 1904, complainant needed, and asked the city for a long distance telephone franchise, which was granted by an unsuspecting city council in the belief that the franchise meant what it said. Nine or ten years afterwards, when complainant needs a franchise for a local exchange it comes into a court of equity with the claim that the term "long distance telephone" was a trade name

of a certain new and improved transmitter which had superseded earlier forms of transmitters, and that the word "in" as used in the ordinance, shows an intent on the part of the city council to grant a local telephone franchise. This is, to say the least, an imposition, if not a fraud upon the public.

It occurs to us that this is a splendid opportunity to apply the rule "that when the meaning of a statute is doubtful, so that either of two constructions may with propriety be adopted by the Court, it is the duty of the Court to adopt that construction best calculated to protect the public against fraud and imposition, even though in individual instances such construction may work slight hardships."

Stern vs. Fargo, 18 N. D. 289, 26 L. R. A. (N. S.) 665, 122 N. W. 403.

If either of the constructions contended for by the parties to this suit, can with propriety be adopted, it is the duty of the Court to adopt that construction which will protect the public against fraud and imposition, and complainant's construction of Ordinance No. 180 cannot be adopted in this case without creating an imposition upon the public. Neither can such construction be adopted without doing violence to the South Dakota statutory rule heretofore quoted that "every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor" and that "municipal ordinances must be strictly construed against the party claiming the grant."

The fact that in Ordinance No. 180, the City reserved the right to string wires on complainant's poles for fire alarm purposes is not indicative of the City's intent, at least to the extent that this reservation should be permitted to override the plain intent as indicated by the repeated use of the term "long distance telephone."

We are familiar with the case of City of Vermillion vs. The Northwestern Telephone Exchange Co., 189 Fed. 294. The reasoning on this point in that case does not appeal to us as sound. What that court said amounts

simply to this "That if we (the Court) had been drafting that resolution, we would have drafted it differently and designated the street upon which

the line should run." Now it is probable that no two persons would have worded the resolution in exactly the same way and because A did not word the resolution exactly as B would have done, is no proof that they did not mean the same thing. The argument that the right to use the poles for fire alarm purposes shows that a local franchise was intended is based upon a mere assumption. It is a well known fact that it is customary for cities to reserve this right to use all poles regardless of the number and location of such poles. Suppose the line ran only on one street through the city, the city could save the expense of erecting poles for fire alarm purposes on that one street. But even if complainant's reasoning on this point has any validity, it cannot apply in this case for the evidence shows that complainant has twenty-four long distance lines running through the city, and it cannot be said that there would be no object in the City reserving such right because it would run only on a few streets.

TESTIMONY

The complaint sought to influence the interpretation of Ordinance No. 180 by introducing extrinsic evidence as to the scope and meaning of the term "long distance telephone."

86 The testimony of M. L. Lane, Charles E. Hall,
J. L. W. Zietlow, Kempster B. Miller, T. C. Burns,
Arthur Bersey Smith and J. O. Stockwell were
taken in behalf of complainant on this point.

Transcript of Record, pages 102-117.

At the outset of our discussion of the evidence it is submitted that the language of Ordinance No. 180 is so plain and unambiguous that there is no room for construction, and that none of this evidence was competent on the question of the interpretation of the ordinance in question under the rule that extraneous evidence is not competent to show what was intended by an ordinance or a statute, but that such meaning must be ascertained from the language alone.

City of Vermillion vs. N. W. Tel. Co., 189 Fed. 289.

If this rule is to govern in the present case, then defendants objection to this line of testimony as shown on pages 103-110, of transcript of record, should have

been sustained and such evidence should not have been considered in the determination of this cause. The question of the competency or relevancy of this kind of testimony is raised by the Fifth to the Eleventh inclusive of defendant's assignment of errors which assignments are found on pages 137 to 141 of the Transcript of Record.

Assuming, however, that such evidence was competent for the purpose of interpreting Ordinance No. 180,
we desire to call the Court's attention to the nature
87 of this testimony. From this kind of testimony it is apparent that the complainant rests its claim to a local telephone franchise under Ordinance No. 180, upon an improvement in the construction of telephone transmitters which was invented in 1892. It is claimed that this improved transmitter generally known to the trade as the "solid back," was frequently designated as a "long distance transmitter," and on the strength of this alleged designation of such improved transmitter, it is claimed that the term "long distance telephone" as used in Ordinance 180 had reference only to such improved transmitter. This is the basis of complainant's case in the present instance. This contention of the complainant, defendant earnestly resists.

In the first place, this claim lacks the ring of sincerity when Ordinance No. 135 is examined on the point as to what kind of telephone instruments are required by said ordinance. It will be noted that this ordinance does not specify any particular kind of telephone instruments which must be used under the privileges granted. It simply provides for the construction and operation of a telephone system within the city and the grantees were at liberty to use any kind of telephone instruments or apparatus which they thought best or saw fit to use so

long as they gave adequate service. It was there-
88 fore not at all necessary for the complainant to secure and the city to grant a new franchise or consent to enable complainant to install this so-called "solid-back" or "long distance transmitter" in the local telephone system in the city. They had full authority under Ordinance No. 135 to use such transmitter or any other transmitter they deemed best. It would be absurd in the extreme to hold that a telephone company were

required to secure a new consent or a new franchise from the city every time the company desired to use any improved instrument or apparatus in their telephone system. If this were true, it would greatly retard, if not entirely stop, the development and improvement of the art of telephony. Again, if such were the law, the complainant would be in no position to invoke the aid of the courts in maintaining its present local telephone system in the City of Mitchell, contrary to the will of the city, because it is admitted that they have installed an "automatic" system which is claimed to be the very latest and most up-to-date system known in the telephone world. But where is complainant's consent from the city to install this automatic system? No such consent from the city to install this system has ever been given, and if it were required, complainant is in the city with its automatic system entirely without any right or franchise. Defendant herein does not claim that complainant had no right to install an automatic exchange under the terms of

Ordinance No. 135, yet such must necessarily be
89 the logical result if complainant's contention is upheld. We admit that complainant had the right, under Ordinance No. 135, to install any new or improved telephone instruments or apparatus without securing a special consent thereto. They had the right to install the "solid back" transmitter, in fact, the testimony of Mr. Elce shows that about one-half of the transmitters in use in the city at the time he sold to complainant were solid back transmitters. *Transcript of Record, page 125.* They also had the right to install the automatic exchange as long as the life of Ordinance No. 135 lasted, or any other improved telephone instruments. But defendant does contend that if it were necessary for complainant to secure a new franchise to enable them to install the "solid back" transmitter, then it is also necessary for them to secure a new franchise to enable them to install the automatic exchange or any other new or improved instrument.

Therefore if the complainant had full power and authority under Ordinance No. 135 to install the "solid back" or so-called "long distance transmitter" it would be absurd to claim that the city authorities of the city of

Mitchell would grant a new franchise for the single purpose of granting to complainant a power they already had.

90 Much of the evidence submitted by the complainant seeks to show the difference between the so-called "solid back" transmitter and the "Blake" transmitter. The testimony of Mr. Elce was to the effect that he had at no time while he owned the local telephone exchange in Mitchell, had any Blake transmitters in such exchange. *Transcript of Record, page 124, Folio 233.* The evidence relative to the "Blake" transmitter therefore becomes immaterial and irrelevant.

The substance of complainant's evidence on this point is that prior to the year 1892, the telephone transmitter in most common use was designated as the "Blake Transmitter." That in 1892 an improved transmitter was invented and patented which superseded the Blake transmitter for both local and long distance work as fast as the same could be supplied to the trade from 1893 to 1904, and that by the latter date the Blake transmitter had entirely gone out of use and was obsolete; that this new transmitter was merely an improvement over all former transmitters and marked one step in the evolution of the telephone industry, and that this transmitter was generally called the "solid back transmitter," and among telephone men it was sometimes called the "granular carbon type transmitter" and sometimes the "long distance transmitter," and sometimes the "solid back long distance transmitter" and at other times it was known 91 by various and other names without any references to its qualities as a long distance instrument.

That this solid back transmitter was substituted for the old transmitters as rapidly as the manufacturers could produce them both in local and long distance work. *Transcript of Record, pages 102-117.*

M. L. Lane testified for the complainant that his company, the Northwestern Telephone Company has 730 telephone exchanges and that in all of them this so-called "solid back" or "long distance transmitter" was used exclusively for both local and long distance work, and that he has not known of any Blake transmitters in use

anywhere since 1898. *Transcript of Record, page 104, Folio 198.*

Charles E. Hall for the complainant, testified, that he had been with the Iowa, the Nebraska and the Northwestern Telephone companies, and that in 1895, 1896 and 1897, they began to use the "solid back transmitter." That "we do not call the transmitter now in use the granulated carbon transmitter, but it is held out to the world as the 'solid back transmitter' as contra-distinguished from the one which had the vibrating effect, so we have always spoken of it as the 'solid back'." Also, that the solid back transmitter is in use all over the country in both local exchanges and long distance
92 lines, and the change to this type of transmitter was made as soon as it was perfected and could be supplied to the public. *Transcript of Record, page 106.*

J. L. W. Zietlow, the president of complainant company testified that he first knew of the solid back transmitter in 1890 to 1896, and from that time they were substituted for other transmitters as fast as they could be had. Also, that they were known by the trade name of "long distance telephone instruments." *Transcript of Record, page 107.* On cross examination Mr. Zietlow stated that whenever they put in a local exchange now, they put in solid back transmitters exclusively. That the Blake transmitter is obsolete. That none of his company's long distance lines through or from Mitchell into North Dakota, Minnesota, Iowa, or Nebraska, was continuous, but that if it were desired to send a message either from or through Mitchell to any point in some other state it is necessary to make one or more connections in the state outside of Mitchell. Also that his company had half a dozen long distance or toll stations in the city of Mitchell and that any citizen of Mitchell could use the long distance telephone from any one of those stations regardless of the local exchange; that the local automatic system or exchange in Mitchell could be removed without interfering with the long distance telephone business passing through Mitchell; that the long distance wires in Mitchell terminate in the central exchange office and are not used for local messages at all. *Transcript of Record, pages 108-109.*

John E. Ostiline for the complainant, testified that the transmitter in use in 1906, was called the "solid back long distance transmitter" and that in the early days the instrument was designated the "Blake transmitter," and "long distancee transmitter," and many called it the "solid back." That all transmitters now in use are of the solid back type, and this is used in all telephone work because it is the only kind they can get. *Transcript of Record, page 110.*

The testimony of Kempton B. Miller, T. C. Burns, Arthur Bessey Smith and J. O. Stockwell, is to the same general effect. *Transcript of Record, pages 110-117.*

The Court's attention is also called to the frequency which these witnesses referred to the so-called "long distancee transmitter" as the "solid back transmitter," and the difficulty these witnesses had in referring to these instruments as "long distancee transmitters."

On behalf of the defendant, Hiram D. Curier testified that in 1904, the transmitters on the market were sold for both local and long distance work, and that trans-

mittters of the Blake designs were considered obsolete. *Transcript of Record, page 118.* Also, that

the manufacturers of the solid back transmitter advertised that their transmitters could be used for long distance work, for the purpose of enlightening the subscribers that the instruments could be used for long distance purposes, if necessary. That the term "long distance" means to a subscriber remote points of communication because this phrase has been coined and is used to signify places far removed from each other. That in all operative companies, if a subscriber desires to talk out of town they ask for "long distance." *Transcript of Record, page 119, Folio 225.*

This testimony is also supported by the directions contained in Exhibit A, being the directions found in the complainant's telephone directory at Mitchell. *Transcript of Record, page 109.*

Alva J. Carter for the defendant testified that he is sales manager for the Kellogg Switchboard and Supply Company; that since 1900 he has not known of any telephone manufacturing company putting on the market two forms of telephone transmitters, one for local work

and one for long distance, nor does he know of any dealer or manufacturer that would consider putting in more than one kind of telephone that could be used for
95 both local exchange and long distance work. That he had not seen any telephone instruments offered on the market which were designated on the name plate as "long distance telephones." *Transcript of Record, page 121.*

Joseph B. Edwards for the defendant, testified that he had not at any time any knowledge of the term "long distance" being applied to designate a special type of transmitter, and that the Kellogg Switchboard and Supply Company had never made any distinction of transmitters for purely local or toll and long distance transmission, that is, his company manufactured only one type for all purposes. That the manufacture of Blake Transmitters were discontinued by 1898. That if the telephone companies had stated in their telephone directories that all "telephones are of modern equipment and style, it would have meant the same thing as designating all telephone instruments as long distance instruments. *Transcript of Record, pages 122-123.*

Mr. Elce, the grantee in Ordinance No. 135, testified for the defendant that he had several makes of telephones in his exchange, some Victors, a few Americans and Eurekas, and principally Kellogg phones when he sold out. That he had about 400 phones in his exchange, and
96 that after the first year he had connection with the long distance lines of the Dakota Central Telephone Lines, and that the instruments he used in his local exchange were used in talking over the long distance lines. That he had connections as far as Sioux City and Sioux Falls and Minneapolis, Minnesota. That the telephone instruments used in his local exchange were the latest instruments on the market at that time. That they had some little trouble in talking over long distance, due largely to faulty outside construction work. That in talking over the long distance lines his subscribers would just call up from their local station. That he did not have any Blake transmitters in his exchange, and that the transmitters he used were suitable for long distance work and that is what he bought them for. That the

Kellogg transmitters he used were called solid back transmitters, and was a granulated carbon type. That the phones purchased by him shortly before he sold out were not advertised or designated as long distance telephones. That the Victor transmitter first used was a granular carbon. That he had some subscribers who used the long distance a good deal and they used the same phone as other people used. That about half his instruments were solid back transmitters at the time he sold out. *Transcript of Record, pages 123-125.*

George E. Foster, A. J. King, J. E. Wells, and A. J. Curtis all testified in substance that they were members of the city council of the city of Mitchell at 97 the time of the passage of Ordinances No. 174 and 180. That they were not familiar with the various telephone instruments in use at that time, nor with the different kinds of transmitters. That they had never heard of the transmitter called the "solid back" and sometimes the "long distance transmitters." That they had never heard of any distinction between the telephone instruments used in local exchanges and in long distance lines. That their understanding of the term "long distance telephone" at that time was a telephone which connected the people of Mitchell with towns and points outside of the city. That they did not intend to grant a franchise to operate a local telephone exchange by the said ordinances. That they voted for the ordinances and that there were eight aldermen on the city council at that time. *Transcript of Record, pages 125-129.*

Mr. George A. Silsby testified that at the time of the passage of Ordinance No. 174 and 180 he was the Mayor of the City of Mitchell, that he was not at that time familiar with the various kinds of telephone instruments in use at that time; that he did not know the names of any transmitters or by what name they were generally known; that at the time of the passage of Ordinances No. 174 and 180, he did not know of the purchase of the local telephone exchange by the Dakota Central Telephone Lines, and as far as he knew the members 98 of the council did not know of it. That he understands the term, "long distance telephone" to mean telephone connections between different towns, and that was

the understanding of the city council at the time. That he did not intend to grant by said ordinances a franchise to operate a local telephone exchange. *Transcript of Record, pages 129-130:*

Defendant contends that all of the testimony that was offered by the complainant as well as that offered by defendant but strengthens its contention as to the interpretation of Ordinance No. 180. Certainly it cannot be claimed with any degree of success that the "ordinary sense" of the term "long distance telephone" as used in Ordinance No. 180, is what complainant claims it means, neither can it be said that it *plainly appears* from the ordinance or even from the evidence that it was intended by the City council that passed ordinance No. 180, that such term should be used in any but its ordinary sense. If then, the statutory rule of interpretation that "words used in any statute are to be understood in their ordinary sense except when a contrary intention plainly appears," Sec. 2443, Revised Civil Code of 1903, of South Dakota, is to govern the interpretation of Ordinance No. 180 contended for by defendant, must necessarily be adopted.

99 The complainant is itself in the position of attempting to place a *forced, subtle and strained* construction on the term "long distance telephone" by offering the testimony of a group of experts or at least experienced telephone men to the effect that this term was sometimes applied to an improved form of telephone transmitter among men engaged in the telephone trade and manufacture. The very fact that complainant felt compelled to offer the testimony of these experts is convincing proof that the "ordinary sense" of the term "long distance telephone" is not what complainant contends it means. Otherwise it would not have been necessary for complainant to secure the testimony of these experts, but it could have subpoenaed the ordinary business man on the street to substantiate its claim. But this was not done because counsel for complainant knew that such a course would but result in disaster to complainant's contention. We therefore insist that the interpretation of Ordinance No. 180 contended for by complainant will not only violate the above quoted statutory rules of construction, but that it will violate the rule that

in the construction of a statute, "the particular inquiry is not what is the abstract force of the words used, or what they *may* comprehend, but in what sense were they intended to be used as they are found in the act.

Lawrence County vs. Meade County, 6 S. D. 100 528, 62 N. W. 131.

It also violates the fundamental rule of statutory interpretation that words in a statute if of common use, are to be taken in their natural and ordinary sense, *without* any forced or subtle construction to limit or extend their import.

Laudauer, et al, vs. Conklin, et al, 3 S. D. 462; 54 N. W. 322 and cases heretofore cited.

We submit that if the testimony of complainant's witnesses does not make it clear that the term long distance telephone does not naturally and ordinarily mean a local telephone exchange with modern and improved transmitters, that the testimony of defendant's witnesses had made this contention clear beyond all cavil. When we take into consideration the testimony of Mr. Elce, the original grantee named in Ordinance No. 135, the untenableness of complainant's position becomes much made apparent. He says that he had no Blake transmitters in his exchange and that over half of the transmitters he used were solid back transmitters and that all of them were of the granular carbon type and suitable for long distance service. Under these circumstances complainant's contention that the city council intended to grant a local franchise by Ordinance No. 180 becomes

absurd. If that were true, we would have the city 101 council granting a franchise for something that

the city was already supplied with. Complainant contends that in order to get the improved solid back service, the city granted a local franchise when the city already actually had the improved solid back service. Again, it is agreed by all the witnesses that at the time of the passage of the ordinances in question that the Blake type of transmitter was obsolete and had been so for a number of years, and was no longer on the market. But complainant would have it that the city granted a local franchise in order to escape the use of the obsolete Blake transmitter which was no longer being made and which

was not on the market at all, and which according to the testimony of Mr. Elce, never had been used and was not being used at all in the city. Again, it is abundantly shown by the testimony that the Blake transmitter became obsolete prior to the passage of Ordinance No. 135, and that as early as 1893, the solid back was replacing the Blake as rapidly as they could be manufactured. This process was going on all over the country when the original franchise, Ordinance No. 135, was granted in 1898. This ordinance did not specify the use of the Blake transmitter, nor any other kind of obsolete and antiquated instrument. Therefore, was there any sane reason in 1904,
for granting another local franchise in order to
102 avoid the use of instruments that were already obsolet and out of date in 1898?

But defendant's position on this point is made doubly secure by the testimony of the Mayor and four of the councilmen who passed the ordinances in question. We have one-half of the members of that council and the Mayor who presided over them, declaring that they had no acquaintance with any of the various forms of telephone transmitters and that they had never heard of the Blake, or the solid back, or the so-called long distance transmitter, and were not familiar with the names of the various instruments and that their understanding of the meaning of a long distance telephone is and was that it was a telephone between different towns. Now, if we are to determine the intention of the council that passed Ordinance No. 174 and No. 180, in the face of this testimony, how can it be said that the council intended to grant a local franchise by Ordinance No. 180, on the theory that the solid back transmitter was known as a long distance telephone, when the members of the council and the Mayor had never heard of the solid back or any of its numerous names? In the light of this testimony, complainant's contention reduces itself to this, that the city council of the city of Mitchell passed Ordinance No.

180, in order to get something which the council
103 had never heard of and did not know existed. The bare statement of the proposition shows its utter absurdity.

Again, the Mayor testified that he did not learn of the purchase of the local exchange by the Dakota Central Telephone Lines until after the passage of Ordinance No. 180 and as far as he knew, the other members of the council were kept in the same state of ignorance concerning that transaction. It cannot therefore be claimed here that the council intended to grant a new local franchise in order to enable complainant to operate the newly acquired property. If the council were ignorant of such purchase at the time of the passage of Ordinance No. 180, it will be necessary to assume that the council intended to grant a second local franchise in a city where there were a little over four hundred telephone users, in order to sustain complainant's position. Is such an assumption natural or reasonable?

It will undoubtedly be contended that the evidence of George E. Foster, A. J. Kings, J. E. Wells, A. J. Curtis, and George A. Silsby on what they understood by the meaning of the term "long distance telephone" is incompetent. This evidence was objected to at the time of taking the deposition of these witnesses and such objections were sustained and the correctness of the 104 Court's ruling on these points is raised by the twelfth to the twenty-eighth assignments of error.
Transcript of Record, pages 141-145.

The Court will remember that these witnesses were members of the council and the mayor of the defendant city at the time of the passage of Ordinance No. 180. These men all testified without objection that they were not familiar with the various makes of transmitters or telephone instruments and had never heard of the "Blake" transmitter, or the "solid back" transmitter, or the so-called "long distance transmitter"; they were then asked as to what they understood by the term long distance telephone. This evidence goes to the question of the ordinary and natural meaning of the term "long distance telephone," and as such should be admitted. However, if this testimony is not admissible, then all of the testimony introduced by the complainant on the question of the meaning of the term "long distance telephone" should also be disregarded as the rule which will exclude this testimony of the defendant's witnesses is

equally applicable to the testimony offered by complainant on this point.

Even if it were admitted that the "solid back transmitter" was sometimes called long distance transmitter, that would not necessarily establish plaintiff's contention. A telephone is composed of much more than a transmitter. That is but one of the parts of the whole telephone. There are other parts, such as the receiver, the line, wire, cables, poles, switchboards, ringing or calling devices, and batteries. The term "long distance transmitter" certainly does not include any of the above enumerated parts, and while the term "long distance transmitter" may have been used to designate one portion of the instruments and fixtures that go to make a telephone, yet a "long distance transmitter" is not a "long distance telephone." The latter is much more than the former, and when we speak of a long distance telephone we must necessarily include the receiver, the ringing device, the wires, cables, poles, batteries and other fixtures, and this therefore becomes an entirely different matter than a mere "long distance transmitter." For example, how can it be said that a wire running from one house to the house on the next lot is a "long distance" wire. In the very nature of the physical conditions, a telephone wire running from house to house in a small city of 6,500, such as Mitchell is, could not be a "long distance line" if the natural and ordinary meaning of that term is followed. How then could a local telephone system within the corporate limits of the city of

Mitchell be a long distance telephone? It would 106 be a physical impossibility.

EXTRANEous CIRCUMSTANCES AND CONTEMPORANEOUS CONSTRUCTION

Circumstances surrounding the passage of Ordinance No. 180 and the interpretation heretofore placed upon it preclude the adoption of complainant's contention.

The construction placed upon a franchise by the grantee will be adopted by the court where it is contrary to the construction contended for in the particular case.

Kerz vs. Galena Water Co., 139 Ill., App. 598.

Doubtful statutes will be construed in the light of

the practical construction placed upon them by the public officers of the state, and acted upon by the people.

Gaar Scott & Co. vs. Sorum, 11 N. D. 164, 90 N. W. 799.

Fallipee vs. Witmayer, 9 S. D. 479, 70 N. W. 642.

State ex rel Edgarly vs. Currie, 3 N. D. 310, 55 N. W. 858.

The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect is entitled to great respect in the court, and is not to be disregarded without the most cogent and persuasive reasons.

Studebaker vs. Perry, 184 U. S. 258.

Pennoger vs. McConnoughty, 140 U. S. 1.

Stuart vs. Laird, 1 Cranch 299.

107 Cooper Queen Mining Co. vs. Arizona Board, 206 U. S. 474.

Edwards vs. Darby, 12 Wheat. 206.

United States vs. North Carolina, 6 Pet. 29.

Heath vs. Wallace, 138 U. S. 573.

Texas, etc. Ry Co. vs. Ailene Cotton Oil Co., 204 U. S. 426.

McKeen vs. Delaney, 5 Cranch 22.

Old Colony Trust Co. vs. Omaha, 230 U. S. 100.

One of the latest expressions of the Supreme Court especially applicable to this case is found in the opinion of Mr. Justice Van Devanter in the last case cited above. In that case the court was considering the effect of a resolution adopted by the City of Omaha, which declared a forfeiture of the rights of the Electric Light and Power Company, acquired under an ordinance of 1884. The question of jurisdiction was not involved in that case because the suit was instituted by the Old Colony Trust Company, a foreign corporation against the City of Omaha, and it was urged by the city that certain decisions of the Supreme Court of Nebraska were not well grounded, and upon this point the Supreme Court said:

"We need not say more of the first branch of the objection than that, as the decisions relate to matter of local law, namely, the construction of the state Constitution and statutes and the powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no

infraction of any right granted or secured by the Constitution of the United States. Such an infraction is not suggested, nor could it reasonably be."

The Court in this case in speaking of the effect of the interpretation of an ordinance by parties to litigation said:

"Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." (Citing several cases.)

If the practical interpretation of Ordinance 180 as adopted by the parties to this controversy is of great and controlling influence upon the court, is there any escape from the conclusion that the plaintiff considered that it derived its right to maintain a local telephone exchange in the City of Mitchell to the 11th day of May, 1913, under Ordinance 135?

The first telephone franchise granted in the City of Mitchell, South Dakota, was the franchise embodied in Ordinance No. 135 of said City, and set out in full in the

stipulation of facts herein, *pages 67-69, Transcript 109 of Record*. This franchise was granted to F. B.

Elce for a period of fifteen years from May 11th, 1898, and it is agreed that Mr. Elce duly accepted the terms and conditions of said ordinance, and that he built and operated a local telephone exchange under said ordinance, and continued to operate it until about the 25th day of May, 1904. *Transcript of Record, page 69*. At the above date, he sold out his interest in said telephone system and his rights and privileges to the Dakota Central Telephone Lines. *Transcript of Record, page 69-70 and 73*. And that on or about the 2nd day of October the said Dakota Central Telephone Lines sold said local telephone system together with its rights, franchises and privileges in the City of Mitchell, to the complainant herein. *Transcript of Record, page 73*. It is further agreed that sometime prior to the passage of Ordinances No. 174 and 180 set out on pages 71-72 of Transcript of Record, the Dakota Southern Telephone Company, a partnership constructed long distance telephone lines into the City of Mitchell, South Dakota, but that the rec-

ords of the City of Mitchell, South Dakota, does not show that any consent was ever given by the city to the construction or maintenance of said long distance telephone lines, or that the same was ever ratified by the city, and

110 that sometime in 1903, the said Dakota Central Telephone Lines purchased the said long distance

telephone lines, and that about October 2, 1904, they were sold to the complainant herein, and that said complainant since that time has owned and operated said long distance lines in the city, and that the

- complainant has never secured the consent of the City of Mitchell to maintain said long distance lines within the corporate limits of the City, except as such consent may have been given by Ordinance No. 174 and Ordinance No. 180. *Transcript of Record, page 73.*

It is further agreed and stipulated that the complainant herein, owns and operates two separate and distinct telephone systems, namely, a local telephone exchange, and a long distance or toll telephone system, that said local telephone exchange is a separate and distinct telephone system or exchange from the long distance system, that the local telephone exchange furnishes facilities to the residents of the City of Mitchell to communicate with each other by telephone at a flat rate per month, and that the long distance system or toll lines are used exclusively in transmitting and receiving messages coming from outside of the city to or from inhabitants within the city, to people outside of the city, and that the wires or lines of the local exchange

111 are used only for local telephone service within the corporate limits of the city, except when they are connected to the long distance or toll line system

for the purpose of receiving or transmitting long distance messages to or from the outside of the city; and that in case any local subscriber desires to use the long distance system he must first call up the central exchange and be connected to the long distance lines, and that the use of said long distance lines is charged for each time it is so used, the amount of the charge depending upon the distance and the length of the time used in transmitting such message. It is also agreed that a number of subscribers or patrons of the local telephone exchange, the exact num-

ber of which is not known, never use the long distance line. *Transcript of Record, pages 80-81.*

It is further agreed that from the time the complainant became the owner of the local telephone exchange, they complied with Section 3, of said Ordinance No. 135, which required the grantee or his assigns therein to provide a suitable and convenient place for a central office and to maintain such office in operation during the business hours of each week and at such other times as the business might demand. It is also further agreed that the complainant during the time up to May 11th, 1913, furnished three telephones to the City of Mitchell, free of charge, as required by Sec. 4, of said Ordinance
112 No 135. *Transcript of Record, page 79.*

It is further stipulated and agreed that the gross receipts from the local telephone exchange exceeded \$2,400 for each of the years in which the complainant has owned said exchange, and that in accordance with the requirement of Section 4, of said Ordinance No. 135 for the year ending May 31, 1905, the complainant voluntarily and without objection paid to the city ten per cent of said gross receipts above \$2,400 for that year, amounting to \$300, and that for the year ending May 31st, 1906, the complainant voluntarily paid to the city the ten per cent of said gross receipts above \$2,400 for that year, amounting to \$412.30, and that thereafter the complainant refused to pay said ten per cent of the said gross receipts for the year ending May 31st, 1907, and 1908, and that thereupon the city of Mitchell sued said complainant for said gross earnings charges and recovered judgment against the complainant for same, and that some time during the year 1911, the complainant herein paid said judgment. And in addition thereto the complainant voluntarily and without objection paid to the city the ten per cent of the gross earnings above \$2,400 for the year ending May 31st, 1909 and 1910, and that said complainant has refused to pay said gross earnings charges for the years ending May 31st, 1911 and 1912, and up to May 11th, 1913, when said ordinance expired, for the
113 reason that complainant claims that it is relieved from the payment of said charges by the provisions of Chapter 84, Laws of 1911, of the State of South

Dakota, and particularly Sec. 6 of said Chapter. *Transcript of Record, pages 79-80.*

It is further agreed that the complainant from the time it became the owner of said local telephone exchange and up to May 11th, 1913, complied with the provisions of Section 3, of said Ordinance No. 135, which provided that the maximum rent for said telephone established under said ordinance should not exceed \$2.00 per month for each business telephone and \$1.25 per month for each residence telephone. Also that on or about the 17th day of March, 1913, the complainant filed with the Board of Railroad Commissioners of the State of South Dakota a new schedule of rates for such Board's approval, said rates to take effect May 12, 1913, and that the city duly protested against the jurisdiction of said Board in said matter. *Transcript of Record, pages 77-79.*

It is further agreed that since 1910 the complainant refused to pay the gross earnings charge imposed by Ordinance No. 135, for the reason that complainant claims that it is relieved from the payment of said charge by the provisions of Chapter 84 of the Session Laws of 1911 of the State of South Dakota, and particularly by Section 6 of said Chapter. *Transcript of Record, page 80, Folio 154.*

Said Chapter 84 of the laws of 1911 is a statute providing for the assessment and taxation of telephone properties in the State of South Dakota and Section 6 thereof is as follows:

"All such telephone property so assessed by the state board of assessment and equalization shall be taxable upon said assessment at the same rates and for the same purposes as the property of individuals within such counties, cities, incorporated, towns, townships and lesser taxing districts. The proper officer of each taxing district shall certify to the county auditor the several rates of taxes to be levied in said district and the said county auditor shall extend the taxes against such assessment in a book to be called the "Telephone Tax Book" and shall transmit a copy of the rates so extended to each telephone company, which tax so levied and extended shall be in lieu of all other taxes whatsoever, including taxes on earnings that be now provided for by any law, ordinance,

or regulation of any city, town, county or township in this state."

From these stipulated facts, it is at once seen that at the time of the passage of Ordinance No. 180 the defendant city had one local telephone system operating under Ordinance No. 135 under which the city derived a reasonable compensation for the use of its streets and public grounds for telephone purposes, that this 115 local franchise had nine years yet to run. Also, that the complainant herein had a number of long distance telephone lines running into and through defendant city for which it had no franchise, and that to maintain such long distance lines in said city it was necessary to secure a franchise.

Article X, Sec. 3, South Dakota Constitution.

The City thereupon passed Ordinance No. 180, using the term "long distance telephones" in stating the purpose of the grant. Certainly these facts are convincing proof that the City did not intend to grant a franchise for a local exchange. It cannot be claimed that it would be reasonable for the defendant city to grant a franchise for a second local exchange and to give up its right to the gross earnings charge derived under Ordinance No. 135.

Again, the stipulated facts show that both the complainant and the defendant city up to the commencement of this action did not consider Ordinance No. 180 as granting a franchise for a local telephone exchange.

The complainant complied with all the terms of Ordinance No. 135 after the passage of Ordinance No. 180 up until the year 1908, when complainant refused to pay the gross earnings charge imposed by that ordinance on the grounds that Ordinance No. 180, and the resolution of April 10, 1907, relieved it from the further 116 payment of such charge, and also that the city did not have the power to impose such charge. *Transcript of Record, pages 87-89.* These contentions of complainant were rejected by the Supreme Court of South Dakota.

*City of Mitchell et al vs. Dakota Central Tel. Co.,
25 S. D. 409. 127 N. W. 582.*

The stipulated facts further show that complainant voluntarily complied with all of the other conditions of

Ordinance No. 135 and that immediately upon the expiration of Ordinance No. 135 complainant applied to the Board of Railroad Commissioners of South Dakota for permission to change its rates from those specified in Ordinance No. 135. These facts show conclusively that both parties to this controversy considered that complainant's local telephone exchange was operated under Ordinance No. 135 and its long distance lines were being operated under Ordinance No. 180, and that the later ordinance did not give to complainant a franchise to operate a local exchange.

It is further stipulated that prior to the expiration of Ordinance No. 135, complainant unsuccessfully negotiated with defendant for a new local telephone exchange franchise. *Transcript of Record, pages 98-100.*

If complainant's claim that Ordinance No. 180 gave
117 it this privilege, then certainly there would be no necessity for it to secure a new franchise.

Again, the only ground given by complainant for not paying the gross earnings charge imposed by Ordinance No. 135, since 1910 was not because it had been relieved from such payment by Ordinance No. 180 but because Chapter 84, Laws of 1911, of South Dakota, had relieved it from such obligation. This contention has since been rejected by the Supreme Court of South Dakota, in City of Mitchell vs. Dakota Central Telephone Company, 36 S. D. 588, 156 N. W. 63.

It is therefore earnestly submitted that neither the language of Ordinance No. 180 nor the circumstances surrounding its passage nor the interpretation heretofore placed upon such ordinance will permit of the adoption of complainant's contention in this respect, and that to do so would in effect be the granting of a franchise for a local telephone exchange in Mitchell by this Court.

RES ADJUDICATA

In addition to the foregoing, the defendant insists that the question of the meaning and scope of Ordinance No. 180 has been determined by the Supreme Court of South Dakota, and it is therefore no longer an open question. This question was determined in the case here-

118 tofore referred to wherein defendant herein sought to recover the gross earnings charge imposed by Ordinance No. 135, for the years ending May 31, 1907, and 1908. The pleadings in that case are set out in the stipulated facts. *Transcript of Record, pages 82-90.*

It was claimed in the Court below and will undoubtedly be claimed here that the issues in the present case are different from those in former case and that therefore this point was not decided.

From the pleadings, it will be observed that the main defense was Ordinance No. 180 and the resolution of April 10, 1907. It is true that the relief sought in that case is not the same as the relief sought in the present action, but we do not understand the rule to be that a prior adjudication cannot be set up as a defense except where the relief prayed for is identical in the various suits. If points actually litigated and decided are the same, it is immaterial as to whether the relief prayed for is identical. One of the main questions for decision in the former case was whether Ordinance No. 180 gave to complainant here a franchise to operate a local telephone system, because if that were true then Ordinance No. 180 had superseded Ordinance No. 135 and the City of Mitchell could not collect the gross earnings charge imposed by said Ordinance No. 135. There can be therefore 119 no escape from the fact that the interpretation, scope and meaning of Ordinance No. 180 was directly in issue in that litigation and the Supreme Court of South Dakota could not dispose of the case without deciding this question. The fact that this point was directly and necessarily in issue is further conclusively shown by the opinion of that court.

City of Mitchell et al vs. Dakota Central Telephone Co., 25 S. D. 409.

At page 414 the court said:

"It will thus be seen that the questions presented are: (1) Did the City of Mitchell have authority to grant to the predecessor of the defendant the right to establish its telephone system in the city of Mitchell upon the condition that it pay to the city 10 per cent of its gross proceeds over and above the sum specified? (2)

Did the subsequent ordinance No. 180, granting to the defendant the right to maintain a long distance telephone system within the City of Mitchell, have the effect of repealing the provisions relating to the payment of the 10 per cent of its gross proceeds as provided in section 4, of Ordinance No. 135?"

At page 419 the Court said:

"The further contention of respondent that Ordinance No. 180, granting to the defendant the privilege or franchise for installing a long distance telephone plant, in effect repealed the provisions of Ordinance No. 135, did not, in our opinion, have the effect of repealing, qualifying, or modifying Ordinance No. 135, and the fact that the defendant paid the 10 per cent on its gross proceeds for two years subsequent to the adoption of Ordinance No. 180 clearly shows that it did not claim, for a time at least, that Ordinance No. 180 in any manner affected the prior ordinance. Repeals by implication are never favored, and this rule is too well settled to require the citation of authorities. There is clearly no inconsistency between the two ordinances; one being for a local city telephone system, and the other being for a long distance telephone system. It may reasonably be presumed that the long distance telephone would not increase the servitude imposed upon the streets and alleys of the city; and, its object being to connect the residents of the city with the other towns and villages and other parts of the country, it might prove of sufficient benefit to the residents of the municipality to warrant the municipality in imposing no conditions upon the long distance telephone system, and hence its exemption from the imposition of any burden upon it in the way of compensation for the use of the streets and alleys of the city may have been very properly made."

Relative to the Resolution of April 10, 1907, it appears that the court below has adopted the construction placed upon it by the Supreme Court of South Dakota, because the injunction granted therein only extends to the expiration of Ordinance No. 180, whereas the resolution in question has no time limit. This resolution is perhaps therefore not in issue before this court. However, we take the liberty of calling this

court's attention to the decision of the Supreme Court of South Dakota on the meaning and scope of this resolution. That court in 25 S. D. 409, at page 420 said:

"It is further contended by the respondent that the resolution adopted on April 10, 1907, had the effect of modifying or repealing Ordinance No. 135; but this contention is clearly untenable. The resolution reads as follows: 'Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys, and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general, communication by telephone and other improved appliances.' It clearly appears from the phraseology of this resolution that it was simply intended to authorize the respondent to construct and maintain through and under the streets and public grounds of said city 'all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances.'

122 It does not purport to repeal, amend, or modify ordinance No. 135 or ordinance No. 180 further than to allow the respondent the right to place its wires underground instead of stretching them upon poles in the streets; in other words, it was simply a permission to the respondent to place its wires underground where necessary in view of the increasing population and business of the City of Mitchell. It may be further stated that an ordinance of a municipality can only be repealed or changed by an ordinance and not by resolution. In 21 Am. & Eng. Ency. of Law, 1003, the rule is thus stated: 'The act which repeals a law must be of equal dignity with the act which establishes it; hence an ordinance can be repealed only by another ordinance, and not by a resolution or motion.' In 28 Cyc. 385, the learned author, in discussing the methods of repealing an ordinance, says: 'The repeal may not be effected by mere resolution or motion or by a void ordinance, but must be enacted in the manner required for passing a valid ordinance.' We are clearly of the

opinion, therefore, that the court's conclusions of law were erroneous, and that its conclusions and judgment should have been in favor of the appellants."

From the foregoing it is thus seen that the question of the meaning and scope of Ordinance No. 180 and of the Resolution of April 10, 1907, was necessarily involved in the former case, and was definitely decided therein. And that inasmuch as the parties to that action were the same parties involved in the present case the decision of the Supreme Court of South Dakota should be respected by this court.

Appellant therefore respectfully submits that the trial court erred as set out in appellant's specifications of error and that the judgment herein should be reversed and the trial court directed to dismiss complainant's Bill of Complaint with costs to the defendant.

Respectfully submitted,

LAURITZ MILLER,

EDWARD E. WAGNER,

Solicitors for Appellant.

(25,361)

SUPREME COURT OF THE UNITED STATES

NO. 531

THE CITY OF MITCHELL, APPELLANT,

v.s.

DAKOTA CENTRAL TELEPHONE COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH DAKOTA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 531

THE CITY OF MITCHELL, APPELLANTS,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF SOUTH DAKOTA.

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APPELLEES BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 531

THE CITY OF MITCHELL, APPELLANTS,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF SOUTH DAKOTA.

STATEMENT OF THE CASE.

On May 11, 1898, the city council of the City of Mitchell, S. D., by ordinance, granted to one F. B. Elce, his heirs, associates and assigns, the right to the use of the streets, alleys and public grounds of said city for the erection and maintenance of a telephone system for the term of fifteen years from that date.

Ordinance No. 135. Record page 67.

Thereafter Elce installed and until 1904, operated a local telephone exchange under said Ordinance No. 135.

On March 21, 1904, the city council of the City of Mitchell, by ordinance entitled, "An Ordinance to Grant Permission to the Dakota Central Telephone Lines, (Inc.) their Successors or assigns, the right to Erect Poles and Fixtures, and to String Wires, for the Purpose of Operating Long Distance Telephone Lines, Within and Through the City of Mitchell, South Dakota," granted the "Dakota Central Telephone Lines" (a corporation), of which appellee is the successor, the right and privileges, given to the Dakota Central Telephone Lines, (Inc.) their successors and assigns, to erect

poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main street, Park avenue, Fourth street and Fifth street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Ordinance No. 174, Record page 71.

On May 25, 1904, Elce entered an agreement for the sale of said telephone exchange to said Lines Company. The transfer was completed and possession delivered on July 6, 1904.

Record pages 69, 70, and Paragraph VI, page 73.

On June 7, 1904, the city council of the City of Mitchell by ordinance entitled, "An Ordinance to Grant Permission to the Dakota Central Telephone Lines, (Inc.) their Successors or Assigns, the Right to Erect Poles and Fixtures and to String Wires, for the Purpose of Operating a Long Distance Telephone System, Within and Through the City of Mitchell, South Dakota," granted to said Lines Company the right, "and privilege, given to the Dakota Central Telephone Lines (Inc.) their successors or assigns to erect poles, string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park avenue, Fourth and Fifth streets, this exception, however, not to prohibit the crossing of Main, Park avenue and Fourth and Fifth streets, at right angles, where it is necessary, and maintain the same for a period of twenty years from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named."

Ordinance No. 180, Record page 72.

It will be noticed that the title to Ordinance No. 174, "For the Purpose of Operating Long Distance Telephone Lines," while, the title to Ordinance No. 180, reads, "For the Purpose of Operating a Long Distance Telephone System." Section One of Ordinance No. 174, reads, "For supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell." Ordinance No. 180, contains the

same words, except, that the word, "IN" is added making the clause read, "With parties residing 'IN', near or at a distance from Mitchell."

It will be noticed further that Ordinance No. 180, grants the right to erect poles and string wires on any of the streets, alleys and public highways of the city except, Main, Park Avenue, Fourth and Fifth streets. Also the City reserves the right to string wires on the telephone poles for fire alarm purposes. Section No. 5, of Ordinance No. 180.

Record page 72.

That in 1903, the Lines Company, had acquired certain telephone lines running into the City of Mitchell theretofore constructed and operated as toll lines by the Dakota Southern Telephone Co.

Record page 73, Paragraph V.

On October 2, 1904, the Dakota Central Telephone Lines Company sold, assigned and transferred to Appellee all its properties, including the exchange and toll lines at Mitchell.

Record page 73, Paragraph VI.

That on or about the 10th day of April, 1907, the City Council of said City of Mitchell duly passed and the Mayor of said City approved a resolution, in words and figures, as follows:

"Be it resolved, by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct, and maintain through and under the streets, alleys and public grounds of said city all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

Record page 73, Paragraph VII.

Thereafter Appellee put its wires under ground, erected a fire proof exchange building, and in 1912, installed an automatic telephone exchange representing an investment of at least \$110,000.00. See Paragraph X, of Bill of Complaint, Record page 9, and admissions in Paragraph X, of Answer, Record page 24.

On March 17, 1913, the Mayor and City County of the City of Mitchell, in regular session assembled passed, adopted and published an ordinance or resolution terminating the rights of the Appellee to construct, operate and maintain a local telephone exchange in said city from and after May 11, 1913, and requiring Appellee *forthwith on May 11, 1913*, to remove its telephone property from streets, avenues, alleys and public grounds of said city and providing that if Appellee fails, neglects or refuse to comply with the pro-

visions of said ordinance or resolution, the City Council would take such steps as may be necessary to secure the IMMEDIATE removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell.

Record page 74, Paragraph IX.

The approval of the mayor is shown at the bottom of page 75 of the record.

In Paragraph XIV, of the bill of complaint, (Record page 12) the passage adoption and publication of the ordinance of March 17, 1913, is alleged, all of which is admitted in Paragraph XIV, of the answer ,(Record page 26).

In Paragraph XV, of the Bill of Complaint, (Record page 15) it is alleged, "That said defendant cause a copy of said resolutions first above set forth in Paragraph XIV, hereof, to be served on the complainant, and now threatens that if complainant does not remove its said lines and exchange from the City of Mitchell, on May 11th, 1913, and cease to operate said telephone exchange and lines on said date said defendant will proceed to remove the poles and wires from the streets and alleys of said city, and further threatens that it will disconnect the telephones of complainant's subscribers in said City by cutting the wires connecting such telephones with complaint's telephone exchange. And your orator alleges that the defendant, the City of Mitchell, will, unless restrained and enjoined by this Honorable Court, proceed to cut down, remove and disconnect the said telephone poles, lines, wires and telephones, and remove the same from the streets and alleys of said city all to the great and irreparable damage of this complainant."

The answer (Paragraph XV, Record page 26) admits the allegations of Paragraph XV of the Bill of Complaint.

In Paragraph XVI, of the Bill of Complaint, (Record page 16) it is alleged, "And your orator further alleges and shows to the Court that the said ordinance or resolution so passed, adopted and published by said city on March 17, 1913, was expressly intended to apply, and does in fact apply to your orator alone, and was passed, adopted and published with a view of permitting, authorizing and directing the officers and agents of said defendant city, under the guise and form of law, to cut down, remove, destroy, and ruin your orator's said telephone lines and exchange so situated within said City, and with a view of preventing, hindering and obstructing your orator in the further enjoyment of the rights and franchises granted your orator by the State of South Dakota, and with a view of obstructing, hindering and interfering with your orator in the transmission of its

interstate business over its said telephone lines in and through said city.

And your orator further shows to the Court that said defendant claiming and pretending that the said ordinance or resolution of March 17, 1913, is a valid and lawful ordinance or resolution and within the powers conferred upon said city by the laws of the State of South Dakota, intend to further enforce the same by preventing your orator from operating, extending or renewing its said telephone lines and exchange within said city and threatens to prevent your orator and its officers, agents and servants from operating, extending and renewing its said telephone lines and exchanges so situated within said city, and thereby involve your orator in a multiplicity of suits."

The answer to this allegation is as follows: "Answering the sixteenth paragraph of said Bill, the defendant denies that plaintiff is vested with any contract of property or franchises which entitle it to the right-of-way for its telephone lines over the streets, alleys and highways of said city, or that plaintiff has in any manner or form secured any consent from said city to construct, maintain or operate a local telephone exchange in said city other than the consent given in said ordinance numbered 135, and denies that plaintiff has at all times complied fully and faithfully with all of the regulations and requirements of said city relative to the occupancy of said streets and alleys for such telephone purposes, and denies that said resolution of March 17, 1913, was passed, adopted and published with a view of permitting, authorizing or directing the officers and agents of the defendant to cut down, remove, destroy and ruin its telephone lines and exchange with a view of preventing, hindering, or obstructing plaintiff in the enjoyment of any of its rights acquired under ordinances No. 174 and 180, or otherwise, than as hereinbefore stated." Paragraph XVI, of answer. Record page 27.

In Paragraph XIX of the Bill of Complaint, (Record page 17) it is alleged: "That said ordinance set out in Paragraph XIV, hereof, has the force and effect of a law of the State of South Dakota within the intent and meaning of Section Ten of Article One, of the Constitution of the United States. That said ordinance so construed as a law of the State of South Dakota is a law impairing the obligation of contracts and as such will and does impair the obligation of the contracts arising between the complainant, and the State of South Dakota, and the City of Mitchell, by reason of the granting to the complainant its Charter Rights, including the right to occupy the streets, alleys, highways

and public grounds of the State for telephone purposes, and the consent of the City of Mitchell to the construction of the telephone exchange and lines in the City of Mitchell, and the acceptance of such rights and privileges by complainant and by the construction of said telephone exchange and lines within the City of Mitchell, all to the great and irreparable damage of the complainant."

This allegation is denied by Paragraph XIX, of the Answer. Record page 28.

In Paragraph XX of the Bill of Complaint, (Record page 17) it is alleged: "Your orator further alleges that the value of the telephone exchange and lines situated in the City of Mitchell, consists largely in the labor of installing the poles, wires and other apparatus. That if such telephone exchange and lines are taken down and dismantled, the salvage will be nominal, and the greater part of the value of such exchange, and lines will be destroyed. That to enforce said ordinance of May 17, 1913, and remove or cause to be removed, or to require the complainant to remove its said telephone exchange, lines, poles, and wires from the streets, and alleys of said city, will deprive complainant of its property in said telephone exchange and lines without due process of law, and will amount to a confiscation, thereof, in violation of the Fifth Amendment to the Constitution of the United States."

This allegation is denied by Paragraph XX, of the answer. (Record page 28.)

In Paragraph XXI, of the Bill of Complaint,, (Record page 18), it is alleged: "Your orator further shows to the Court and alleges that the wrongs done and threatened to be done your orator by the defendant as hereinbefore alleged will impair your orator's contract, property, rights and franchises vested in your orator by the State of South Dakota and consented to by the said City of Mitchell, as hereinbefore alleged, and will deprive your orator of such contract, property, rights and franchises, without due process of law, and will obstruct and interfere with your orator in the dispatch and transmission of its said interstate business in violation of the Constitution and laws of the United States and of the Act of Congress regulating interstate commerce."

The answer to this paragraph is as follows, (Paragraph XXI of Answer) page 28 of the Record:

"Answering the twenty-first paragraph of said Bill, the defendant denies that any of the things done or threatened to be done by it will impair any contract between plaintiff and the defendant or any of its property rights

or franchises vested in it by the State of South Dakota and consented to by the defendant, and denies that any rights have become vested in plaintiff by virtue of any of the acts of the defendant herein that will in any manner be impaired by any of the things done or threatened by the defendant, as alleged in said paragraph."

Ordinance No. 180.

The District Court in its decision finds that the words, "Long Distance Telephone or other electrical devices" occurring in Section One of Ordinance No. 180, should be interpreted as follows:

"In my opinion, a fair conclusion from all the evidence in the case as to the meaning of the words 'long distance telephone,' as used in Ordinance 180, is this: a telephone suitable and efficient for long distance use, and capable of being connected with and used in connection with wires running to distant points; and the meaning of said section is, that the telephone company was granted a franchise to furnish facilities of such character as to transmitters, receivers, poles, wires, switching devices and other necessary appliances, that the patrons of the company in the City of Mitchell could at their own homes or places of business communicate with others, whether in the city, near the city, or at a distance from the city. This construction, in my opinion, gives force and effect to all of the words of the grant, and does violence to none of the language therein contained." (Record page 59, Folio 115.)

While there is no assignment of error challenging the finding of the Court as not being supported by the evidence, we call attention to some of the evidence submitted tending to show that, "Long Distance Telephone" was a trade name applied to certain types of telephone instruments. Kempfer B. Miller, electrical engineer and author, testified: "As the solid back instrument was brought out, the Chicago Telephone Company, a Bell concern, sometimes replaced the Blake with the solid back, and charged an increased rate, and they were then commonly referred to as long distance instruments. Independent companies would commonly call the new and improved transmitters, long distance instruments. These were usually, if not always of the so-called granular carbon type. It was a common custom among both Bell and independent companies after adopting the more popular granular carbon instruments to herald them as long distance instruments. The manufacturers advertised these improved types of telephones as long distant instruments regardless of whether they were to be used for long distance or local service. Record page 111, Folio 210.

T. C. Burns, telephone manufacturer for thirty years and president of American Electric Co., testified: "Most all telephone companies advertised the granular type of transmitter as 'long distance.' This was quite common by companies in opposition to the Bell Company, which company was using to a large extent inferior instruments, and only giving the long distance granular carbon type to a few subscribers at a higher rental, and in many cases we instructed our promoters to advertise the fact that our instruments were the long distance type, and we made this as one of the inducements to grant franchises for local exchanges." Record page 113, Folio, 213.

Arthur Bessey Smith, electrical engineer and author, testifies:

"I am also familiar with some of the trade names by which the independent manufacturers have called their transmitters of the granular carbon type from 1894 to 1904. Some of these were called 'Hunnings' transmitter, others were called 'solid backs,' others, 'granular carbon,' others 'long distance,' 'gold electrode,' 'American Beauty,' and the like. Many of the manufacturers combined the term 'Long Distance' with the other trade designation.

Most of the instruments produced by independent manufacturers designated as long distance telephones were efficient for use in long distance, and the transmitter produced by the American Electric Company is fully equal to the other transmitters which have been mentioned. Record page 114, Folio 216.

"BRIEF OF ARGUMENT"

JURISDICTION OF THE DISTRICT COURT.

Jurisdiction is to be determined upon the allegations of the Bill of Complaint:

- Mayor v. Cooper, 6 Wall. 247.
- Railroad v. Mississippi, 102 U. S. 141.
- Tennessee v. Davis, 100 U. S. 257, 264.
- Omaha Horse Ry. Co. v. Cable Co., 32 Fed. 727.
- St. Paul, M. & M. Ry. Co. v. St. Paul & P. Ry. Co., 15 C. C. A. 167.
- North Am. Cold Storage Co. v. Chicago, 211 U. S. 306.

Jurisdiction cannot be defeated by an answer or plea so conceived and drawn as to avoid consideration of any Federal question:

- St. Paul, M. & M. Ry. Co. v. St. Paul, & N. P. Ry. Co., 15 C. C. A. 167.
- Wright v. Nagle, 101 U. S. 791.

Jurisdiction is predicated on two grounds:

First. State law impairing the obligation of a contract.

Second. Taking of property without due process of law.

Appellant challenges the jurisdiction of the District Court on two grounds:

First. That the resolution of March 17, 1913, is not a law of the state.

Second. The decision of the Supreme Court of South Dakota, that a resolution of a city council is not of equal dignity with and does not operate as a repeal of an ordinance enacted by a city council, is conclusive and binding in Federal Courts.

Record page 132.

The first section of the assignment arises the question whether the ordinance or resolution of March 17, 1913, as alleged in the bill of complaint is a law of the state.

The second section of the assignment is frivolous because based entirely on defensive matter and not on matters disclosed by the Bill of Complaint.

The ordinance or resolution of March 17, 1913, was a law of the State impairing the obligation of a contract.

It is alleged in the Bill of Complaint, admitted by the answer and found by the Court that the ordinance or resolution was regularly passed, adopted, approved and published and that it possesses all the attributes of an ordinance.

Record pages 12, 26, 62 and 74.

Appellant has not by any assignment of error, challenged above mentioned findings.

THE ORDINANCE OR RESOLUTION WAS WITHIN THE POWERS OF THE CITY.

"No telephone line shall be constructed within the limits of any village, town or city, without the consent of its local authorities."

Section 3, Art. 10, Constitution of South Dakota.

Sec. 554, Civil Code of South Dakota, grants to the owners of any telephone lines right of way over lands belonging to the state, public grounds, streets, alleys and highways in the state, subject to control of municipal authorities as to what streets, etc., said lines shall run over or across and the place where poles are to be set.

The above provisions of the Constitution and statute have been construed by the Supreme Court of South Dakota, as follows:

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state the right of way over lands and real property belonging to the state,

and the right to use public grounds, streets, alleys and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located. The right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations." Provided, however, that no telephone line shall be constructed within the limits of any city without the consent of its local authorities." Rev. Civ. Code No. 554; Const. S. D., Art. 10, No. 3.

Missouri River Tel. Co. v. City of Mitchell, 22 S. D. 191.

In City of Mitchell v. Dakota Central Tel. Co., 25 S. D. 409, the Supreme Court of South Dakota expressly held that the City of Mitchell had power to grant telephone franchises.

STATUTORY GRANTS OF POWER.

Sec. 1229 of the Political Code of South Dakota, is the statute defining the powers granted to cities. By Subdivisions 7, 8, 9, 10, power is granted to lay out, establish and improve streets, plant trees on same, regulate the use of the same and prevent and remove obstructions upon same.

Subdivision 60, grants the power to declare what shall constitute a nuisance and to abate the same.

Sec. 2400, Civil Code, provides "The remedies against public nuisance are:

1. Indictment.
2. A civil action; or,
3. Abatement.

Sec. 2403, Civil Code provides, "A public nuisance may be abated by any public body or officer authorized thereto by law." The power of the city to abate a nuisance was upheld in Huron v. Bank of Volga, 8 S. D. 449.

The poles and wires of the telephone exchange were not subject to removal upon the expiration of the franchise, until the city by appropriate action terminated the rights of the company to occupy the streets:

Mutual Union Tel. Co. v. Chicago, 16 Fed. 309.

State v. Central Union Tel. Co., 14 Ohio Cir. Ct. Rep. 273.

Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234.

Laighton v. Carthage, 175 Fed. 145.

Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116.

Wakefield v. Theresa, 109 N. Y. S. 414.

From the foregoing it appears that the resolution of March 17, 1913, was within the powers of the city and related to subject matter within the jurisdiction of the city council.

WHETHER THE CITY LABELED ITS ACTION, "ORDINANCE" OR RESOLUTION IS IMMATERIAL.

There is no statute in South Dakota requiring cities to act by ordinance only. Subdivision 81, of section 1228, Pol. Code, confers power on city council, "To pass all Ordinances, Rules and make all Regulations proper or necessary to carry into effect the powers granted to the cities."

We cite the following statutes requiring the city to act in some cases by ordinance, in others by resolutions. Thus showing the lack of uniform requirement.

Political Code, Sections 1376, 1377, 1380, 1381, 1256, 1296, 1301, 1303, 1306, 1307, 1311, 1333, 1340, 1357 and 1398.

That a resolution may have the force and effect of law is clearly recognized by Section 1214 of the Pol. Code, viz.: "No laws, ordinances or resolution having the effect of law for the government of any city or town passed by the legislative body or bodies there of * * * shall go into effect until twenty days after the passage of such law, ordinance or *resolution* and the words law, ordinance or *resolution* used in this article means ordinance, *resolutions*, orders, agreements, contracts, franchises and any measure which it is in the power of the law makers or the electors of any municipality to enact."

Where the resolution is passed with all the formalities of an ordinance, it thereby becomes a legislative act and it is immaterial whether called an ordinance or resolution:

McQuillin Municipal Corporations, Vol. 2, p. 1395.

Alma v. Guaranty Sav. Bank, 8 C. C. A. 564.

The question of jurisdiction was not certified to this Court.

Impairment may be by resolutions:

Northern Pac. Ry. v. Duluth, 208 U. S. 583.

Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453.

Iron Mountain Railway v. City of Memphis, 37 C. C. A. 410.

A. T. & S. Ry. Co. v. Shawnee, 183 Fed. 85.

Appellant attempts to bring this case within the rule of:

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142.

Dawson v. Columbia Trust Co., 197 U. S. 178.

Des Moines v. City Ry. Co., 214 U. S. 179.

The case at bar is clearly distinguished from the above cases and comes within the rule of the following cases:

Owensburg v. Cumberlaint Tel. & Tel. Co., 230 U. S. 58.

A. T. & S. F. Ry. v. Shawnee, 183 Fed. 85.

Northern Pac. Ry. Co. v. Duluth, 208 U. S. 583.

WAS THERE A CONTRACT TO BE IMPAIRED.

Ordinance No. 180, (Record page 72) was intended to and does grant a franchise for an exchange. The words occurring in the ordinance, "Long Distance Telephone," related to the telephone instruments and not to the telephone lines. "Long Distance Telephone," was a trade name applied to telephones equipped with an improved type of transmitter. The ordinance provided for the option of long distance telephone or other electrical devices. When the automatic exchange was installed the so-called long distance telephones were abandoned and other electrical devices, *automatic telephones*, were installed.

The changes made in the form of the ordinance No. 180, as compared with ordinance 174, clearly indicates something more than a franchise for toll lines. The provisions for city fire alarm system indicates that a franchise for an exchange was intended.

Vermillion v. N. W. Tel. Ex. Co., 189 Fed. 289.

If a franchise for toll lines was all that was required then Ordinance No. 174, would have been sufficient and there would have been no occasion for enacting ordinance No. 180.

Ordinance No. 174, was enacted in March, 1904. In April, 1904, appellant's assigns entered into a contract for the purchase of the Elce exchange in Mitchell. Ordinance No. 180, was enacted in June, 1904, and the purchase of the exchange was completed in July, 1904. This clearly indicates the purposes for which Ordinance No. 180 was intended.

CITY'S CONSENT.

No particular mode of expressing consent is required either by the Constitution or by statute and consent may be implied.

Telephone Co. v. Mitchell, 22 S. D. 191.

Power to consent to the construction does not confer power of consent of operation and maintenance:

Telephone Co. v. Minneapolis, 86 N. W. 69.

Abbott v. City of Duluth, 104 Fed. 833..

Duluth v. Tel. Co., 87 N. W. 1127.

State v. Flad, 23 Mo. App. 185.

Telephone Co. v. Red Lodge, 76 Pac. 758.

Irvin v. Telephone Co., 37 La. 633.

Hodges v. Western Union, 29 L. R. A. 770.

- Farmer & Getz v. Tel. Co., 74 N. E. 1078.
Chamberlain v. Tel. Co., 93 N. W. 596.
Tel. Co. v. Shebovgan, 90 N. W. 441.
State v. Mil. Ind. Tel. Co., 114 N. W. 108.
Pittsburg Appeal, 115 Penn. 4.
State v. Mayor, 49 N. J. Law, 303.

RES JUDICATA.

Appellee is not estopped by the decision in *Mitchell v. Dakota Central Tel. Co.*, 25 S. D. 409, because:

First. The suit is not on the same claim or demand.

Second. The particular point was not involved.

Third. In determining whether there is a contract to be impaired and in interpreting such contract the Federal Courts are not bound by the decisions of the state courts.

On the first two points, we cite:

Russell v. Place, 94 U. S. 606.

Davis v. Brown, 94 U. S. 423.

Carter v. Carter, 103 N. W. 425.

In suits of this kind the Federal Courts exercise an independent judgment as to the existence and proper construction to be placed upon a contract:

Mobile & Ohio Ry. Co. v. Tennessee, 153 U. S. 486.

Mercantile Trust Co. v. City of Columbus, 203 U. S. 311.

Perry Co. v. Norfolk, 220 U. S. 472.

Milwaukee Electric Co. v. R. R. Commissioners, 238 U. S. 174.

State v. Port Royal & A. Ry. Co., 56 Fed. 333.

Owensboro v. Cum. Tel. & Tel. Co., 230 U. S. 58.

Bank v. Stone, 88 Fed. 383.

Testimony of ex-city officials as to what they intended when they enacted the ordinance No. 180, is inadmissible:

City of Vermillion v. N. W. Tel. Ex. Co., 189 Fed. 289.

ARGUMENT AND BRIEF.

We agree with appellant that the issues on this appeal are:

1. The jurisdiction of the United States District Court to hear and determine the matters in controversy.
2. The scope and interpretation to be placed upon Ordinance No. 174 and 180, as heretofore set out.
3. Whether or not the matters in controversy herein is res adjudicata, so as to be binding upon the United States Courts.

Appellant's Brief p. 17.

It will be noticed that the validity and effect of the resolution of March 17, 1913, is not presented, except, as it bears on the question of jurisdiction.

"JURISDICTION."

Appellant by its first assignment of error challenges the jurisdiction of the District Court on two grounds:

First. That the resolution is not a law and did not, and does not have the force and effect of a law of the State, impairing the obligations of a contract.

Second. The Supreme Court of the State of South Dakota, has considered and decided that a resolution of a city council in said state is not of equal dignity with and does not operate as a repeal of an ordinance enacted by a city council and such decision is conclusive of this question and binding on the Federal Courts.

Appellant's Brief pp. 17 and 18.

The jurisdiction of the District Court is to be determined upon the allegations of the bill of Complaint:

"If, on the face of the complaint or declaration, the case is one which the court has the power to hear and determine, because of the existence of a federal question, it has the right to decide every issue that may subsequently be raised; and whether the decision of the case ultimately turns on a question of federal, local, or general law is a matter that in no wise affects the jurisdiction of the court. *Mayor v. Cooper*, 6 Wall. 247; *Railroad Co. v. Mississippi*, 102 U. S. 135, 141; *Tennessee v. Davis*, 100 U. S. 257, 264; *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 32 Fed. 727." *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 167, 68 Fed. 10.

If jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the consideration of any federal question or questions:

St. P., M. & M. Ry. Co. v. St. Paul & N. R. C.,
15 C. C. A. 167, 68 Fed. 9, 10.

Wright v. Nagle, 101 U. S. 791.

In the Bill of Complaint it is claimed that the action complained of and sought to be restrained violated the constitutional law relating to a law of the state impairing the obligation of a contract and taking of property without due process. The district court maintained its jurisdiction on both grounds. Record page 45.

The assignment of error raises only to the question relating to a law impairing the obligation of a contract. The second ground stated in the assignment of error cannot be

considered because it is based upon defensive matter which could not in any event defeat the jurisdiction of the Court.

St. P., M. & M. Ry. Co. v. S. Paul & N. R. Co.,
15 C. C. A. 167.

Wright v. Nagle, 101 U. S. 791.

Hence the only question that is presented by the assignment of error is this, Is the resolution of March 17, 1913, a law of the State impairing the obligation of a contract? This question is further presented by the third assignment of error. Record page 136.

In North American Cold Storage Co. v. Chicago, 211 U. S., 306 (Reading from page 314), it is held:

"The Court further held that the allegation that the intention to seize and destroy the poultry without any judicial determination as to the fact of its being unfit for food was in violation of the 14th Amendment could not be sustained; that such amendment did not impair the police power of the state, and that the ordinance was valid, and not in violation of that amendment. The demurrer was therefore sustained and the bill dismissed, as stated by the Court, for want of jurisdiction.

"We think there was jurisdiction, and that it was error for the Court to dismiss the bill on that ground. The Court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged Federal question which was not well founded, there was no jurisdiction. In this we think that the Court erred. The bill contained a plain averment that the ordinance in question violated the 14th Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the Court, over which it had jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed."

Following the doctrine of the above case, the District Court had jurisdiction to decide the question even though the ultimate decision might be in favor of the defendant.

THE RESOLUTION OF MARCH 17, 1913, WAS A LAW OF THE STATE IMPAIRING THE OBLIGATION OF A CONTRACT.

It is alleged in the Bill of Complaint (Record page 12), admitted in answer (Record page 26), stipulated as a fact (Record page 74), and found by the District Court (Record page 62, Folio 120), that the City of Mitchell did, on the 17th day of March, 1913, by its city council in regular ses-

sion assembled, pass, adopt and publish said resolution and that the same was approved by the mayor. The District Court found that the resolution had all the attributes of an ordinance (Record page 62, Folio 120). Appellant has not by any assignment of error challenged that finding either as law or fact.

THE RESOLUTION OR ORDINANCE WAS WITHIN THE DELEGATED POWERS OF THE CITY.

Section Three (3), Article Ten (10) of the Constitution of South Dakota, provides that:

"No telephone line shall be constructed within the limits of any village, town or city, without the consent of its local authorities."

Section 554 of the Civil Code of South Dakota provides as follows :

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways in this state subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations."

In Missouri River Telephone Co. v. City of Mitchell, 22 S. D. 191, (Reading from page 196), the Supreme Court of South Dakota, has construed these provisions of the Constitution and statutes as follows:

"The argument of appellant's counsel in support of the contention that the facts found by the trial court do not sustain its conclusions of law is founded upon a misapprehension as to the source of the plaintiff's rights. Its franchise was derived from the state, not from the city. It is a corporation created by and existing under state laws. The nature and extent of its rights depend on the will of the Legislature, limited, so far as this case is concerned, only by the provisions of the state Constitution that no telephone line shall be constructed within the limits of any city without the consent of its local authorities. Const. S. D., art. 10, § 3. While this provision limits the power of the state Legislature, it grants no legislative power to the municipal council. Though the Legislature may not authorize the construction of a telephone line in any city without the latter's consent, the city has no power to impose any conditions or establish any regulations other than

those permitted by the Legislature. Adding to the statute the constitutional provision regarding consent, the law applicable to the issue here involved is expressed in the following language: 'There is hereby granted to the owners of any telegraph or telephone lines operated in this state the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located. The right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations' Provided, however, that no telephone line shall be constructed within the limits of any city without the consent of its local authorities. Rev. Civ. Code, § 554; Const. S. D. art. 10, § 3.

"Assuming that the local authorities of the defendant city might have arbitrarily refused to admit the plaintiff, if consent to enter the city was given, the plaintiff was subject to municipal control only as to what grounds, streets, alleys, and highways its line should occupy, and as to what place its poles should be located. Consent having been given, the right of the city to control the telephone company results from the statute, and not from the ordinance, resolution, or action of the local authorities by which the consent is manifested; and consent once given cannot be revoked. Appeal of City of Pittsburg, 115 Pa. 4, 7 Atl. 778; State v. Mayor, 49 N. J. Law, 303, 8 Atl. 123. The right of a telephone company to construct its lines anywhere in the state includes the right to enter any city with the consent of its local authorities, and when such consent has been obtained the company is subject only to such rules and regulations as the Legislature may prescribe or authorize the council to prescribe. The right thus conferred upon a telephone company by the state—its franchise—is, of course, subject to control by the Legislature, which is prohibited from making any irrevocable grant of that nature. (Const. S. D. art. 6, § 12.) The Legislature may extend or restrict the powers of cities with respect to these companies as its wisdom may dictate; but no city can impose any conditions or enforce any regulations other than those authorized by the Legislature. And it is fortunate that such is the law: the construction, operation, and management of telephone lines, especially long distance lines, being matters in which all the inhabitants of the state have a constantly increasing interest. So the only issue in this

case is whether the local authorities of the defendant city consented to the construction of plaintiff's line within the city limits."

Again in City of Mitchell v. Dakota Central Telephone Company, 25 S. D. 409, further construing these provisions of the Constitution and statute, that Court said:

"The appellants contend for a reversal of the judgment in this case, 'that the City of Mitchell had full power and authority to pass ordinance No. 135, and to impose upon its consent to the use of its streets for telephone purposes the conditions therein prescribed; that said ordinance No. 135 is valid in every respect and is in full force and effect, and by virtue of its provisions the defendant company is under legal obligation to pay to the plaintiff city the amount prayed for in the complaint herein; that ordinance No. 135, when acted upon, became a valid and binding contract which the defendant is now estopped to deny; that the trial court erred in its conclusions of law No. 1, 2, 4, and 7, and in rendering judgment dismissing plaintiff's complaint and awarding costs to the defendant.' The respondent contends in support of the judgment that the city of Mitchell was without authority to impose the conditions specified in section 4 of ordinance No. 135 relating to the payment of 10 per cent of its gross proceeds in excess of \$2,400, and that the provision providing for the payment of the 10 per cent. of the gross proceeds was void. The respondent further contends that ordinance No. 180 passed by the city of Mitchell in 1904 in effect repealed the provisions relating to the 10 per cent. of the gross receipts provided for in section 4 of ordinance No. 135. It will thus be seen that the questions presented are: (1) Did the city of Mitchell have authority to grant to the predecessor of the defendant the right to establish its telephone system in the city of Mitchell upon the condition that it pay to the city 10 per cent. of its gross proceeds over and above the sum specified? (2) Did the subsequent ordinance No. 180, granting to the defendant the right to maintain a long distance telephone system within the city of Mitchell, have the effect of repealing the provisions relating to the payment of the 10 per cent. of its gross proceeds as provided in section 4 of ordinance No. 135?

Section 3, art. 10, of the state Constitution, provides as follows: 'No street passenger railway or telegraph or telephone line shall be constructed within the limits of any village, town or city without the consent of its local authorities.' It is quite apparent from this section of the Constitution that there is reserved to the municipality the

right to grant or refuse to grant to telephone companies the privilege or franchise for establishing a telephone system within the municipality, and that it necessarily follows that if it had the right to refuse to grant such franchise or privilege, it necessarily has the right to grant the same upon such terms and conditions as it may choose to impose, and, if the telephone company accepts the conditions, they become binding upon the company. Such company cannot accept the grant and proceed to install their plant and refuse to comply with the conditions upon which the grant was made.

Section 554 of the Civil Code provides as follows: 'There is hereby granted to the owners of any telegraph or telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways in this state subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporation.' The latter law does not, in our opinion, have the effect of repealing subdivision 9, 10, and 17 of section 229, Rev. Pol. Code, which confers upon cities the right to control and manage its streets and alleys. Both Codes, having been passed at the same time, must be construed together, and these sections will also be construed with reference to the state Constitution known as section 3 of article 10, which is hereinbefore quoted. Those sections construed together would seem (1) to give the city exclusive right to control its streets and alleys, and (2) the Constitution prohibits the state from passing any law granting to an individual or corporation the right to construct a telephone system or a street railway unless consented to by the municipality. Subject to these rights the state confers upon corporations or individuals the right to construct telegraph and telephone lines over the lands belonging to the state, and gives its consent, subject to the foregoing provisions to the same being constructed within the municipality. If section 554 of the Civil Code was given the effect claimed by the respondent, it would clearly be in conflict with section 3 of article 10 of the state Constitution. It cannot be presumed therefor that by this section of the Civil Code it was intended either to repeal the provisions of the subdivisions referred to in section 1229 of the Revised Political Code, or to pass a

law in conflict with the state Constitution. Conditions prescribed in ordinances granting the privileges or franchise to telephone companies subject to the condition of the payment of a portion of its proceeds as compensation for the use of its streets and alleys for telephone purposes are generally upheld by the Courts. And when the terms are accepted and acted upon, it becomes a contract binding upon the parties, and the party receiving the benefit of the grant is estopped from pleading that the conditions were *autra vires*."

It will be noticed that while there is an apparent conflict between the two decisions, yet, the Court in the last opinion does not criticize, modify or overrule the former opinion. The second opinion seems to be merely an extension of the matters determined in the first cause. In the first case the Court was dealing with the question as to whether when a city has given its consent such consent can be withdrawn. In the second case the Court was considering the validity and enforcement of a promise made by way of consideration or inducement to the city to give its consent.

As we view these opinions they amount to this: that any consideration, promise or inducement by which the city is induced to give its consent is valid and binding but that after consent has once been given the city cannot subsequently withdraw its consent or impose any new obligation or condition.

STATUTORY GRANTS OF POWER.

Section 1129, Political Code (Revised Codes of 1903, page 207) provides:

"The City Council shall have the following powers:

Subdivision No. 7. To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve the streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

Subdivision No. 8. To plant trees on the same.

Subdivision No. 9. To regulate the use of the same.

Subdivision No. 10. To prevent and remove obstructions and encroachments upon the same.

Subdivision No. 60. To declare what shall be a nuisance, and to abate the same, and impose fines upon parties who may create, continue, or suffer nuisances to exist.

The foregoing provisions grant the city full and ample powers. The city is clothed with power to lay out the streets. It is clothed with power to regulate the use of the streets and it is clothed with power to PREVENT AND REMOVE OBSTRUCTIONS AND ENCROACHMENTS UPON THE SAME.

Now if the city is right in its contention that the telephone company had no rights in the streets other than those granted by Ordinance 135, and that all such rights would expire by limitation of time on May 11, 1913, the city by virtue of the mere fact of the expiration of time would not have a legal right to immediately, on the expiration of time, remove the poles and wires from the streets.

Mutual Union Tel. Co. v. Chicago, 16 Fed. 309,
11 Bliss. 539.,

State v. Central Union Tel. Co., 14 Ohio Cir. Ct.
Rep. 273.

Cedar Rapids Water Co. v. Cedar Rapids, 118
Iowa, 234, 91 N. W. 1081.

Laighton v. Carthage, 175 Fed. 145-151.

Cleveland Electric Ry. Co. v. Cleveland, 204 U.
S. 116.

The reasons are that the company has a reasonable time in which to remove its property and it is entitled to a reasonable time in which to negotiate a renewal of its franchise, or, sell its property to those who may succeed in securing a franchise to continue the business. Further than that the company, may, if the city does not object, continue to perform its duty to the public and is subject to the jurisdiction of the Court to enforce the duty thus impliedly arising.

Laighton v. Carthage, 175 Fed. 145.

Wakefield v. Theresa, 109 N. Y. S. 414, 125 App.
Div. 28.

From the above cases it is clear that the mere expiration of time does not in itself necessitate an immediate removal from the streets. There must be something more and that something is affirmative action upon the part of the city denouncing the further occupancy of the streets by the concern whose franchise has expired. That is to say the poles and wires in the street do not become a nuisance and subject to abatement by the mere expiration of the franchise but may become such by the declaration of the city.

Under the state statute above quoted and particularly subdivision 60, of section 1229, Political Code, the city has the power to declare and abate nuisances. In City of Huron v. Bank of Volga, 8 S. D. 449, the Supreme Court of South Dakota, sustained the power of the city to abate nuisances. This was under a city charter which provided that, "The city council shall have power to restrain, prohibit and suppress nuisances at common law."

Section 2400 of the S. D. Civil Code, (1903) reads, "The remedies against a public nuisance are:

1. Indictment.

2. A Civil Action, or,
3. Abatement.

Section 2403. "A public nuisance may be abated by any public body or officer authorized thereto by law." (The above actions are the same as those referred to in Huron v. Bank of Volga, as sections 4688 and 4690 Comp. Laws).

We therefore have this situation: The telephone poles and wires were rightfully in the streets of the city of Mitchell. The city has full power to regulate the use of the streets, to remove obstructions therefrom and to declare and abate nuisances in the street. The Elce franchise would expire by its terms on May 11, 1913. The Telephone Company if it had no franchise rights other than those acquired by it under the Elce ordinance had a right to continue to occupy the streets for a reasonable time after the expiration of the franchise, provided, the city did not by affirmative action declare otherwise.

From this it will be seen that the matters with which the resolution sought to cover were within the power of the city and that the effect of the ordinance was to cut off any period of indulgence after the expiration of the franchise as well as to lay the foundation for abatement by force. It matters little whether the abatement would be based on the power to remove obstructions from the streets or on the power to remove the poles and wires by way of abatement of a nuisance. The resolution of March 17, 1913, was an effective and necessary piece of legislation preliminary to the removal of the poles and wires from the streets on May 11, 1913.

The resolution recites that the rights under Ordinance 135, will expire on May 11, 1913,—that the company refused to accept the terms of a proffered new franchise ordinance; that the company has no other right and then declares, "That the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the city of Mitchell *be and the same are hereby terminated from and after the 11th day of May, 1913.*"

The resolution then notifies the company to remove its property *forthwith on the 11th day of May, 1913*, and in the event of its failure to do so the city council will take such steps as may be necessary to secure the *immediate removal of said poles, etc.*

The last paragraph legislates as to what shall constitute notice of the contents of the resolution and of the intention of the city. We therefore insist that the resolution was

within the powers delegated to the city and that it was legislative.

THE CITY COUNCIL HAS ACTED WITHIN ITS POWERS AND ITS ACTION IS LEGISLATIVE. Confessedly the action of the city was taken as a challenge and demand of the rights the company was asserting under franchises other than Ordinance No. 135.

Also it must be conceded that if the Company is right in its contention,—that it has rights under Ordinance No. 180,—then, the action of the city impairs the contract created by Ordinance No. 180. **DOES THE LABEL, "RESOLUTION," WHICH THE CITY GIVES ITS ACTION RENDER THE LEGISLATION INVULNERABLE TO THE CONSTITUTIONAL RESTRICTIONS AGAINST LEGISLATION IMPAIRING CONTRACTS.**

1. The assignment of error is based solely upon the proposition that a resolution is not a law of a state within the constitutional inhibition.

2. The argument therefor that this resolution is not broad enough and that it comes within the doctrine of *City of Des Moines v. Des Moines City Railway Company* is outside of the assignment of error and is not covered by it.

3. The real question is not the form of the enactment but is,

(a) the enactment one authorized by the Legislature of the state so that the city is acting under power delegated by the Legislature and so that its act is therefore a law of the state, and

(b) does this law of the state impair the obligation of the contract in question?

If the form of the enactment and not its substance is the material thing, then a limitation is written into the Constitution which is that it protects against impairment of contracts only when that impairment is by virtue of an ordinance but that it does not protect against the same impairment of a contract if the action taken is in the form of a resolution.

If this resolution is valid, then exactly the same consequences will follow as if it were an ordinance, and whether the defendant in error is to be protected will depend not upon whether or not its contract with the city and the state is violated but upon the form which this violation takes.

The essential thing is whether or not this resolution was a legislative act in the same sense that it was the exercise by the city of power delegated to it by the Legislature of the state. If it was such an act, and it impairs this contract, it is void. Otherwise, we have the absurd conclusion that

the contract may be impaired by a resolution, which counsel for the plaintiff in error designates as the inferior enactment, but that it may not be impaired by an ordinance, which is the superior enactment.

Assume for the sake of the argument that the resolution of March 17th had been in form an ordinance. Would this ordinance have been an impairment of the contract?

This is not denied. It is not argued or contended that if this had been in the form of an ordinance it would not have been in violation of the contract under Ordinance No. 180, if our construction of Ordinance No. 180 is right.

Conceding this proposition, the remaining proposition is, does the form of the enactment constitute the essential feature or is the essential thing the fact that it violates the contract?

The so-called resolution is sufficient to constitute it a law of the state.

Appellant makes the point that the city could not legislate by resolution.

Subdivision No. 81, of Section 1229, Political Code (Being the statute granting power to the cities), "To pass all *ORDINANCES, RULES*, and make all *REGULATIONS* proper or necessary to carry into effect the powers granted to the cities."

The statutes relating to the matter of legislation by cities are the following:

§ 1376. "Any city may so extend its boundaries as to increase the territory within its corporate limits, not to exceed in any one year one-fourth the area, by a resolution of the city council passed by two-thirds of the entire council-elect, particularly describing the land proposed to be included within the city limits, setting forth boundaries, and describing the lands platted by blocks and lots.

§ 1377. "The resolution of the city council shall be published in the official paper in the city for three consecutive weeks and unless a written protest, signed by a majority of the property owners of said property extension, be filed with the city auditor within ten days after the last publication of such resolution the territory described in the resolution shall be included within and become a part of the corporation of the city, but in case of the filing of such protest, no further proceedings shall be had under the preceding section.

§ 1380. "When by this charter the power is conferred upon the city council to do and perform any act or thing, and the manner of exercising the same is not specifically

pointed out, the city council may provide by ordinance the details necessary for the full exercise of such power."

§ 1381. "The duties, powers and privileges of all officers of any character, in any way connected with the city government, not herein defined, and the defining by this chapter of the duties of the city officers, shall not preclude the city council from defining by ordinance further and additional duties to be performed by any such officers."

§ 1256. The city council shall by ordinance fix and determine the amount of the salaries and compensation of all city officials, and the time the same shall be paid; provided, that in all cities of the first class the mayor and city treasurer shall each receive a salary of six hundred dollars per annum, the city auditor, city attorney and city assessor shall each receive a salary of one thousand dollars per annum, payable in equal monthly installments."

§ 1296. "The city council shall at their regular meeting in Septembtr of each year, or within ten days thereafter, pass an ordinance to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriation shall be made at any other time within such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city, either by a petition signed by them or at a general or special election duly called for that purpose."

§ 1301. "No public grounds, streets or alleys, or part thereof within the city, shall be vacated or discontinued by the city council except upon a petition of the majority of the owners of the property on the line of such public grounds, streets or alleys resident within the city. Such petition shall set forth the facts and reasons for such vacation, accompanied by a plat of such public grounds, streets or alleys proposed to be vacated, and shall be verified by the oath of at least two of the petitioners, and the consent in writing of all the owners of the property adjoining the plat to be so vacated. The city council thereupon shall, if they deem it expedient that the matter should be proceeded with, order the petition to be filed with the city auditor, who shall give notice by publication in the official newspaper of the city for four weeks at least once in each week, to the effect that such petition has been

filed as aforesaid and stating in brief its object, and that said petition will be heard, and considered by the council, or a committee of them, on a certain day therein specified, not less than ten days from the expiration of such publication. The city council, or such committee as may be appointed by them for the purpose, at the time and place appointed, shall investigate and consider the matter, and shall hear the evidence and testimony of the parties interested. The city council, thereupon, after hearing the same or upon the report of such committee favoring the granting of such petition, may, by resolution passed by a two-thirds vote of all the members-elect to declare such public grounds, streets, alleys or highways vacated; which said resolution, before the same shall go into effect, shall be published as in the case of ordinances, and thereupon a transcript of such resolution duly certified by the city auditor shall be filed for record and duly recorded in the office of the register of deeds of the county. Any party aggrieved thereby may, within twenty days after the publication of such resolution appeal to the court of the county, under the same regulations as in the case of opening streets and alleys, and the judgment of the court therein shall be final. * * *

§ 1303. "When the city council shall deem it necessary to open, widen, extend, grade, pave, macadamize, bridge, construct a viaduct, curb, gutter, drain, lay or extend its water mains, or otherwise improve any street, alley, lane, avenue, or highway, or other public grounds, within the city limits for which a special assessment is to be levied as herein provided, the city council shall by *resolution* declare such work or improvement necessary to be done, and such *resolution* shall be published for four successive weeks, etc. * * *

§ 1306. "The city council may by ordinance establish the grade of all streets, alleys and sidewalks in the city, as the convenience of the inhabitants may require, and a record of the same shall be kept, together with the profile thereof, in the office of the city engineer. Provided, that after the grade of any street has been established as provided by law the city shall, if they change the grade, be liable to the abutting property owners for any damage they may sustain by reason of any permanent improvements having been made in conformity to the grade as first established."

§ 1307. "The council shall by ordinance prescribe the width of sidewalks, and may establish different widths in different locations, and determine the kind of material of

which they shall be constructed, having regard to the business and amount of travel in the vicinity of each, and to provide by ordinance for the letting of contracts for building the same."

§ 1311. "The city council may provide by ordinance for repairing sidewalks where the amount of repairs does not exceed the sum of ten dollars for fifty feet of such sidewalk, and may pay for the same out of the general fund if they shall deem it expedient."

§ 1333. "Whenever the city council of any city shall deem it necessary to grade, pave or macadamize any street, avenue or alley, and have taken all the steps prescribed in the preceding article in relation thereto, and so provided by an ordinance passed by two-thirds of all the alderman-elect, they may divide the amount of the special assessment therefor into installments, the first of which shall not exceed twenty per cent. of the total of said assessment, which shall be due and payable from and after the filing of the assessment roll with the city treasurer."

§ 1340. "Whenever any city council shall deem it necessary to appropriate or damage any private property for the purpose of establishing, opening, widening or extending any street, highway or alley in such city, or for the purpose of making any other public improvement or to acquire or damage private property for any public use, the said council shall, by resolution passed by two-thirds majority of all the members-elect, declare such appropriation necessary to be made, stating the purpose therefor and the extent of such appropriation, and thereupon the proceedings for such condemnation and appropriation shall be had as provided in Chapter 40 of the Code of Civil Procedure."

§ 1357. "Whenever the city council of any city which shall have adopted plans for sewerage as herein provided, shall deem it necessary to construct any sewer or sewers, the city council shall by resolution declare the necessity therefor, which resolution shall state the location of such sewer or sewers and designate all terminal points thereof. The city council shall cause such resolution, etc. * * *"

§ 1398. "Whenever any city of the third class shall desire to loan or invest any sinking fund, or any part thereof, the city council of said city shall pass a resolution declaring that it is for the best interest of said city that the sinking fund, or a part thereof, shall be invested or loaned, also stating the kind or kinds of securities in which such fund or part thereof shall be loaned or invested and said resolution shall be published for three successive

weeks in the official newspaper of said city, and at the expiration of such publication the said city council shall again vote on the resolution and if it receive a majority vote of the city council of said city, then the city treasurer of said city shall be instructed by the city council to invest said sinking fund, or part thereof, in the kind or kinds of securities determined upon by the said city council."

From the foregoing it will be seen that the cities are required to act by ordinance in some instances, while in others they are required to act by resolution. This shows that there is no general requirement that the city must in all cases act by ordinance.

We call attention particularly to Subdivision 81, of Section 1229, that the city in legislating to carry into effect the powers granted may pass all ordinances, rules and regulations, etc. Clearly the city is not restricted to ordinances. Again we find interpretation and recognition of the various forms of municipal legislation in Section 1214, of the Political Code, relating to the Initiative and Referendum:

§ 1214. "No laws, ordinances or resolution having the effect of law for the government of any city or town passed by the legislative body or bodies thereof, except such as are for the immediate preservation of the public peace, or the public health, or safety, or expenditure of money in the ordinary course of the administration of the affairs of such public corporation, shall go into effect until twenty days after the passage of such law, ordinance or resolution, and the words law, ordinance or resolution used in this article mean ordinances, resolves, orders, agreements, contracts, franchises and any measure which it is in the power of the law makers or the electors of any municipality to enact."

Here is a plain and clear cut recognition of the power of a city to *enact resolution having the effect of law*.

IT IS IMMATERIAL WHETHER THE ACTION IS LABELED "ORDINANCE" OR "RESOLUTION."

"Where the resolution is passed with all the formalities of an ordinance, it thereby becomes a legislative act, and it is immaterial whether called an ordinance or resolution."

McQuillin Municipal Corporation, Vol. 2, p. 1395,
Sec. 633.

In City of Alma v. Guaranty Sav. Bank, 8 C. C. A. 564 (reading from page 567), Judge Thayer says:

"The law is well settled that a municipal corporation may declare its will as to matters within the scope of its corporate powers, either by a resolution or an ordinance, unless its charter requires it to act by ordinance; and

generally it is of little significance whether a legislative measure is couched in the language of an ordinance or of a resolution, where it is enacted with the same formalities which usually attend the adoption of ordinances."

Appellant relies on Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292, but the case is not in point. What the Court holds in that case is that where a city is empowered to establish a light plant, it must first enact an ordinance authorizing the plant and making provision for its maintenance and operation, before it can levy taxes for the construction, maintenance and operation of the same.

In the case at bar the resolution was passed with all the formalities of an ordinance. It has all the attributes of an ordinance. There is no statute requiring the action to be by ordinance in the specific matter. The mere label of "Ordinance," or "Resolution," is not controlling.

"QUESTION OF JURISDICTION NOT CERTIFIED."

On this proposition we call attention to the following:

The decree is dated September 10, 1915, was entered September 14, 1915, and hence was entered during the April, 1915, term of the District Court. The decree is shown on pages 42, 43, 44, and 45 of the printed record and date of entry appears at foot of decree at top of page 45 of the record. The bill in this cause was filed in the Southern Division of the District Court for the District of South Dakota. (See title of bill page 2 of the record and filing endorsement of clerk on bill page 19 of the record.)

By section 106 of the Judicial Code of the United States, it is provided, "Terms of the District Court for the Southern District shall be held at Sioux Falls, on the first Tuesday in April and the third Tuesday in October."

The petition for appeal and assignments of error were filed on April 4, 1916, and were served on respondent's attorneys on April 15, 1916. (Record pages 145-146). The first Tuesday in April, 1916, was April 4, 1916, hence the petition and assignments of error were filed on the first day of the April, 1916, term of the District Court. The order allowing the appeal was entered April 15, 1916. (Record page 147).

The statement of the evidence was certified by the District Judge on May 6, 1916, and filed May 8, 1916. (Record page 131). The certificate of the District Judge to the testimony, (Record page 131), the petition for appeal (Record page 146), and the order allowing the appeal (Record page 147), show the appeal to be one taken generally from the decree and the record does not contain any certificate by

which the question of jurisdiction is certified to the Supreme Court.

Appellant also entirely ignores the claim made by the complainant in the Bill of Complaint under the "due process" clause of the Constitution.

IMPAIRMENT MAY BE BY RESOLUTION.

But the impairment may be by resolution is too well established to be open for discussion:

Northern Pac. Ry. v. Duluth, 208 U. S. 583.

Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453.

Iron Mountain Ry. v. City of Memphis, 96 Fed. 113, 37 C. C. A. 410.

A. T. & S. Ry. Co. v. Shawnee, 183 Fed. 85.

Appellant attempts to bring this case within the rule in St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142; Dawson v. Columbia Trust Co., 197 U. S. 178; and Des Moines v. City Ry. Co., 214 U. S. 179.

In the St. Paul case the Court says, "No legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract did or could result."

In the Dawson case the Court says, "There was no legislation subsequent to the contract."

In the Des Moines case the Court says, "We are of the opinion that this (the city resolution) is not a law impairing the rights alleged by appellee." "That the only menace to appellee was the direction to the city solicitor to bring suit to determine the rights of the parties."

The present case comes squarely within the rule announced in Owensbury v. Cumberland Tel. & Tel. Co., 230 U. S. 58. In that case the offending ordinance required the telephone company to remove its poles and wires from the streets within a reasonable time and upon failure to remove the mayor was directed to have them removed.

In the case at bar the ordinance or resolution terminates the rights of the company and declares the company shall have no right after May 11, 1913, to operate a telephone exchange and requires the company to forthwith on May 11, 1913, remove its property from the streets and in case of its failure to so remove the city council will secure the immediate removal of the same.

In A. T. & S. F. Ry. v. Shawnee, 183 Fed. 85, the Court of Appeals of the Eighth Circuit had occasion to distinguish that case from the Des Moines case. The Court says:

"It is contended by defendants that the case is controlled by City of Des Moines v. Railway, supra. In that

case all the parties were citizens of Iowa, and jurisdiction of the Circuit Court was invoked upon a federal question claimed to arise from the impairment, by a resolution of the municipal council, of its contract rights under an ordinance granting the use of the city streets for the operation of a street railway. It was also asserted that the resolution, if enforced, would take the property of the complainant without due process of law, contrary to the fourteenth amendment. The Supreme Court held the resolution was not a legislative act infringing the rights of complainant, but was a mere declaration by the city of its position in a controversy then going on, and a direction to its law officer to resort to the courts if its view was not accepted. The case was therefore dismissed for want of jurisdiction. In the case at bar jurisdiction is founded upon diversity of citizenship, but the question as to the character and effect of the resolution is nevertheless involved in the general equities of the case. The resolution instructed the mayor and city clerk to serve a written notice upon the company to open the street and put it in condition for travel within 30 days or steps would be taken by the city to compel it to do so. Embodied in the resolution was the form of the notice, as follows:

'You are hereby notified that by resolution passed by the mayor and council of the city of Shawnee, state of Oklahoma, on the 25th day of September, 1908, you must place the crossing of your right of way over and across Tenth street in the said City of Shawnee in good condition for travel by the general public within thirty days from the service of this notice upon you, or the mayor and council of said city of Shawnee will proceed as by law authorized to compel you to do so.'

We think this resolution is quite different from that in the Des Moines case, and that it is substantially like that held in Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, to impair the obligation of a prior contract. It is more than a mere declaration of the attitude of the city and a direction to its law officer to bring suit in court. It not only denies the company has any right or title to the street arising from a lawful vacation, but demands that it shall assume the burden of opening it up and restoring it to public travel. The resolution is militant, not merely declaratory. What steps the city would take if the company failed to comply are not expressed; but they may be inferred from the provisions of an Oklahoma statute which imposes upon every railroad company doing business in the state the duty

to construct and maintain in good condition for the use of the public the crossings at the intersection of its tracks and public highways, and prescribes a penalty of \$25 per day for each day's neglect to do so after 30 days' written notice by the board of alderman of a city. Comp. Laws 1909, § 7498. According to well-settled principles, a court of equity has jurisdiction of such a case as this."

WAS THERE A CONTRACT TO BE IMPAIRED.

We contend that Ordinance No. 180, (Record page 72) was intended to and does grant a franchise for the establishment, maintenance and operation of a telephone exchange in the city of Mitchell for a period of twenty years from and after June 7, 1904.

Appellant contends that the ordinance is only a franchise for the use of the streets for the purposes of toll lines running into and through the city. The contention is based on the words, "Long Distance Telephone." It is our contention that the phrase, "Long Distance Telephone, or other electrical devices," relates entirely to the telephone instrument. That at that time the name, "Long Distance Telephone," was applied to the then latest improved telephone instrument.

Let us first see if there is anything in the ordinance indicating the setting of pole lines for toll purposes only. The ordinance provides that poles and wires may be placed on any of the streets, alleys and public highways, except Main, Park Avenue, Fourth and Fifth Streets. The poles and wires are to be located under the direction of a committee appointed by the city council. By section 3, the poles, wires and fixtures are to be so placed as not to interfere with travel and traffic on the streets, nor, with shade trees, nor, with the flow of water in the mains, sewers and gutters of the city. The right is reserved to the city for future regulation, not destructive however, to the rights and privileges herein granted. The city reserved the right to string wires on the poles for fire alarm purposes.

Upon quite a similar state of facts the Court of Appeals of the Eighth Circuit in the case of Vermillion v. N. W. Tel. Ex. Co., 189 Fed. 289, held that the grant was for an exchange. The Court speaking particularly about the fire alarm wires said:

"The resolution further provides, 'That the city of Vermillion may have the free use, if desired, of their poles for fire alarm and police wires.' This language clearly indicates that a local exchange was to be established. The use of the poles of a through line would have been of no advantage for the purpose of fire and police wires."

In fact every part of the ordinance, other than the phase, "Long Distance Telephone or other electric devices," indicates that an exchange was contemplated. What was meant by "Long Distance Telephone or other electrical devises." We have submitted testimony showing that at the time this franchise was granted there was an improved telephone instrument known to the telephone trade as, "Long Distance Telephone." That such telephone was one equipped with a transmitter capable of being used against greater resistances than the ordinary telephones theretofore used. This is not restricted to mere matter of distance. The resistance of distance is only one of the elements to be overcome. There are the interferences occasioned by high tension electric currents such as electric light and street car lines and many minor interferences, so that a given type of telephone that would be efficient for conversation over a distance of fifty miles in rural districts would not be efficient over a distance of five miles in our great cities. Hence an analysis of the testimony shows that the Long Distance Telephone was simply an instrument equipped with the most efficient transmitter. Again the language of the ordinance is plain, "By long distance telephone or other electrical devises." Suppose instead of long distance telephones, 'other electrical devises' had been installed. Would the use of such, 'other electrical devises,' have been controlled by 'long distance telephone.' The disjunctive, 'or', precludes such interpretation.

Suppose the ordinance had read, "by electrical devises," there would be nothing whatever antagonistic to an interpretation in favor of an exchange. The record shows that the so-called, "Long Distance Phones," have been discarded and automatic telephones and systems installed, so that on March 17, 1913, when the resolution of ouster was passed the company was in fact using the "Other electrical devises." Is the situation any different than it would have been if the ordinance read, "electrical devises."

Another important feature is the following language in the ordinance, "For supplying the citizens of Mitchell and the public in general facilities to communicate * * *" with parties residing *IN*, near or at a distance from Mitchell. How could citizens of Mitchell talk with parties *IN* Mitchell over a long distance toll line. How could facilities for such intercommunication between people in Mitchell be supplied, except, through the medium of a telephone exchange.

Judge Booth in his decision of this case in the District Court has covered this branch of the case so completely that we quote that part of the decision:

"The title of the ordinance is as follows:

"An ordinance to grant permission to the Dakota Central Telephone Lines (Incorporated) their successors and assigns, to erect poles and fixtures, and to string wires for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota.

"The words 'system,' 'within' and 'through' contained in said title are significant; and taken together would seem to indicate that something more was intended to be granted than a mere right to carry long distance telephone wires through the city. In section one of the ordinance is granted the right and privilege, 'to erect poles and string wires on any of the streets, alleys and public highways of the City of Mitchell,' excepting Main, Park Avenue and Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets at right angles, where it is necessary.' This language of the ordinance is broad and comprehensive, and certainly capable of a construction broad enough to cover the erection and maintenance of a local exchange.

"Again, in the same section is the following language: 'for supplying the citizens of the City of Mitchell, and the public in general, facilities to communicate with parties residing in, near or at a distance from Mitchell.' The words 'in,' and 'near' are as important as the words, 'at a distance from,' and cannot be disregarded in construing the section in question. It would be unreasonable to suppose that a right was granted to the telephone company to erect and operate a telephone system by which a citizen of Michell living near the city limits could talk over the telephone line with a party living ten rods distant, but outside of the city limits, but that said citizen could not talk with another citizen within the city over the telephone line, though the last named party was distant many times as far as the person outside of the city limits. In order that the construction of the defendant may prevail, it would be necessary to practically eliminate the words, 'in' and 'near' from said section. But it is one of the cardinal rules of construction of ordinances that all words contained therein shall if possible be given full force and effect.

"The defendant, however, relies upon the expression, 'Long distance telephone' contained in said section, as indicating a purpose on the part of the city not to grant permission to the telephone company to maintain and operate under said ordinance a system whereby the citizens of Mitchell could communicate by telephone with each other. Much testimony has been introduced, without objection, on

the part of the respective parties to this suit, touching the meaning of the words 'long distance telephone.' The testimony of the various witnesses has developed the fact that the words in question had at the time of the passage of ordinance 180 several different and distinct meanings. According to the testimony of some of the witnesses, the words indicated telephone communication by improved or more powerful transmitters. According to others, telephone communication by solid back transmitters. According to the testimony of other witnesses, telephone communication by toll lines running between towns and cities at a considerable distance from each other. According to the testimony of still other witnesses, telephone communication by telephone having a common battery system as distinguished from a local battery system. In my opinion a fair conclusion from all the evidence in the case as to the meaning of the words, 'long distance telephone,' as used in Ordinance 180, is this: a telephone suitable and efficient for long distance use, and capable of being connected with and used in connection with wires running to distant points; and the meaning of said section is, that the telephone company was granted a franchise to furnish facilities of such character as to transmitters, receivers, poles, wires, switching devices and other necessary appliances, that the patrons of the company in the City of Mitchell could at their own homes or places of business communicate with others, whether in the city, near the city, or at a distance from the city. This construction, in my opinion, gives force and effect to all of the words of the grant, and does violence to none of the language therein contained."

IF THE CITY ONLY INTENDED TO GRANT A FRANCHISE FOR TOLL LINES INTO AND THROUGH THE CITY WHY WAS IT THAT ORDINANCE NO. 174, WAS NOT SUFFICIENT AND WHY WAS IT NECESSARY TO PASS ORDINANCE NO. 180.

Ordinance No. 174, and No. 180, appear in the record on pages 48 and 49. An examination of the two ordinances discloses two important distinctions between them.

The title of No. 174, reads, "For the purpose of operating long distance telephone lines."

The title of No. 180, reads, "For the purpose of operating a long distance telephone system."

Why the change from "Telephone Lines," to "Telephone System."

In section one, Ordinance No. 180, reads the same as No. 174, except, that the word, "IN" is inserted after the

words, "With parties residing." Why was this change made.

Again we quote from Judge Booth's decision:

"If we go outside of the language of the ordinance, and consider the circumstances leading up to and surrounding its passage, we are led to the same conclusion. At the time of the passage of the ordinance in 1904 a considerable percentage of the telephones in use in the City of Mitchell were equipped with an old style or type of transmitter, not capable of efficient service in long distance telephone work. Long distance facilities had become of great and growing importance. The telephone company in question was operating both long distance lines and local exchange lines in other parts of the state. Ordinance 174 had been passed in March, 1904, but had been disapproved by the Telephone Company, as unsatisfactory. A new ordinance, No. 180, was prepared and submitted for passage. Ordinance 180 was largely in the same terms as ordinance 174, but there were several noticeable changes. In the title of Ordinance 174 occur the words, 'for the purpose of operating long distance telephone lines within and through the City of Mitchell.' In the title of Ordinance 180 the above wording is changed so that it reads, 'for the purpose of operating a long distance telephone system within and through the city of Mitchell.' Further, the words 'In' was inserted between the word 'residing' and the word 'near,' where the same occur towards the end of section one; so that while ordinance 174 reads 'with parties residing near or at a distance from Mitchell,' ordinance 180 reads 'with parties residing in, near or at a distance from Mitchell.' These changes in the wording of the title and of this most important section of the ordinance are significant. The changes were made openly and advisedly. It cannot be believed that the changes were made without being discussed and fully understood by both parties interest.

"Counsel for the defendant suggests that it is improbable that the city council would pass an ordinance providing for a second local exchange when one was already in existence. To this it may be answered that section 5 of ordinance 135 provides, 'That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns,' thus recognizing the possibility at least of more than one local exchange. Further, the local exchange then existing in the city at the time of the passage of Ordinance 180 was not of the proper efficiency to form a part of a successful long distance system. The purchase of the local telephone system by the Dakota Central Tele-

phone Lines had not been completed, at the time of the passage of Ordinances 174 and 180. As events shaped themselves, however, the Dakota Central Telephone Lines, instead of erecting and maintaining new local telephone facilities, purchased and improved the existing ones.

"Counsel for the city further suggests that it is improbable that the city would have passed an ordinance which might result in taking away from the city the tax created under Ordinance 135. Here again it can be but of slight value to speculate as to the motives of the city in passing Ordinance 180. It may be observed, however, that there is no showing in the evidence in this case of any considerable amount of taxes received by the city under Ordinance 135 prior to the passage of Ordinance 180; nor is there any evidence that there was any assured or substantial basis for concluding that the revenue accruing under Ordinance 135 from a purely local telephone system disassociated from a long distance telephone system would ever be of any considerable amount.

"Counsel for defendant contends that the telephone company by paying taxes under Ordinance 135 subsequent to the passage of Ordinance 180, has placed a practical construction upon Ordinance 180, as not granting a franchise to operate a local telephone exchange. While this suggestion is not without weight, it is by no means conclusive. It is not necessary to speculate upon the reasons why the telephone company continued to operate and pay taxes under Ordinance 135 after the passage of Ordinance 180. There may have been many and sufficient reasons. It is apparent upon the face of the two ordinances that greater street rights are granted under Ordinance 135 than under Ordinance 180. This of itself may have been sufficient.

"Finally, counsel for the city suggests that the negotiations entered into between the telephone company and the city in 1912 looking towards the passage of a new ordinance, tend strongly to show that the telephone company did not at that time claim any right under Ordinance 180 to maintain a local telephone exchange. Such negotiations can have but little weight in determining the questions in controversy here. The proposed new ordinance was not introduced in evidence, and its terms are not disclosed. It might very well be that the telephone company was willing to negotiate for a new ordinance looking to the acquirement of still greater rights and privileges than those which is already had under Ordinance 180, and to continue perhaps for a longer time.

"The conclusion therefore is that Ordinance 180 did, as a integral part of the long distance telephone system franchise therein granted, grant also the privilege or franchise to maintain and operate a local telephone exchange, the subscribers of the telephone company using the same local transmitters in sending their long distance messages." Record pages 60 and 61.

Again it will be noted that on April 10, 1907, a resolution was passed granting the company the right, "To place, construct and maintain through and under the streets, alleys and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances." See paragraph VII, page 73 of the printed record.

It is alleged that relying on this resolution the company proceeded to put its wires under ground and prepare for the installation of an automatic exchange. Paragraph X ,of Bill of Complaint, Record page 9.

The company constructed a fire proof building in which to install and maintain its exchange. The work began in 1907, was carried on continuously and finally completed in 1912. The work progressed slowly because of the continuous operation of the exchange and the work necessarily had to be done in such manner as not to interfere with the operation of the exchange.

We think that if the company had no other rights the resolution of April 10, 1907, is amply sufficient to satisfy the constitutional requirement that no telephone line shall be constructed in any city without the consent of the local authorities.

"No particular mode of manifesting municipal consent to the construction of a telephone line is prescribed by the constitution or statutes. So far as the Constitution is concerned such consent may be either express or implied." Telephone Co. v. City of Mitchell, 22 S. D. 191 (Reading from page 198.)

How can it be said that the city did not consent by its resolution of April 10, 1907, to the construction of the expensive underground work, not for a simple toll line running into and through the city, but ramifying all the streets and alleys necessary for an exchange. It will not work any hardship on the city to hold that the constitutional consent is limited to construction and does not extend to maintenance and operation because the operations of the telephone companies as to rates and general management are under the direct control of the State Railroad Commission, while the

city under its police power can fully protect itself against unreasonable occupancy of the streets.

A number of courts have held that consent to construction does not include consent to operation and maintenance:

Telephone Co. v. Minneapolis, 86 N. W. 69.

Abbott v. City of Duluth, 104 Fed. 833.

Duluth v. Tel. Co., 87 N. W. 1127.

State v. Flad, 23 Mo. App. 185.

Telephone Co. v. Red Lodge, 76 Pae. 758.

Irwin v. Telephone Co., 37 La. 633.

Hodges v. Western Union, 29 L. R. A. 770.

Farmer & Gets v. Tel. Co., 74 N. E. 1078.

Chamberlain v. Tel. Co., 93 N. W. 596.

Tel. Co. v. Sheboygan, 90 N. W. 441.

State v. Mil. Ind. Tel. Co., 114 N. W. 108.

Pittsburg Appeal, 115 Penn. 4.

State v. Mayor, 49 N. J. Law, 303.

Appellee relies upon the Ordinance No. 180, and the resolution of April 10, 1907, as expressing the consent of the city to the construction of the telephone exchange in the City of Mitchell. That while the consent may be predicated upon certain conditions, such as the payment of a gross earnings tax, yet, the consent itself cannot be limited or revoked.

RES JUDICATA.

ESTOPPEL IN FEDERAL COURT BY REASON OF DECISION OF STATE COURT.

Appellant contends that the scope and meaning of Ordinance No. 180, has been determined by the Supreme Court of South Dakota, and it is therefore no longer an open question.

There are three reasons why this is not true:

First. The suit is not on the same claim or demand involved in the prior decision.

Second. The particular point was not involved.

Third. In determining whether there is a contract to be impaired and interpreting such contract the Federal Courts are not bound by the decisions of the State Courts.

The case of *City of Mitchell v. Dakota Central Telephone Company*, 25 S. D. 409, was a suit to collect the gross earnings tax imposed by Ordinance No. 135. (Elce Ordinance). The company defendants on the ground that the city was without power to impose such condition in a franchise ordinance and the precise question as to the interpretation of Ordinance No. 180, was not necessarily involved in the suit. While it is true that the ordinance is referred to in the opinion as a franchise for toll lines, yet, that question was

not in fact litigated in the suit nor, was its decision necessary to a determination of the question of the right of the city to recover the gross earnings tax. The interpretation of Ordinance No. 180 was only collaterally involved and referred to in the opinion of the Court as a matter of argument.

The present action is upon a different claim or demand than the one involved in the case of City of Mitchell v. Dakota Central Telephone Company, 25 S. D. 409.

The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, is thus stated by Mr. Justice Field, in Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195.

"In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand, or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be

as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

To the same effect:

Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.

Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204.

See also:

Carter v. Carter (N. D.) 103 N. W. 425.

Herman on Estoppel, See. 274.

The rule as stated has been adopted by Supreme Court of South Dakota. Pitts v. Oliver, 13 S. D. 566.

It has been settled by a long line of decisions that regardless of the opinions and decisions of State Courts the Federal Courts will in cases involving State law impairing obligations of contracts, exercise an independent judgment in determining as to the existence of a contract and the proper construction to be placed upon it:

"In the case of Mobile & Ohio R. Co. v. Tennessee, 153 U. S. 486, the Court in its opinion, speaking in reference to this question said: 'It is well settled that the decision of a state court holding that, vision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.'

"In the case of Mercantile Trust Co. v. City of Columbus, 203 U. S. 311, the court in its opinion used the following language: 'It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the state legislature, which impairs its obligation.'

And again in the same opinion: "It cannot be determined that there is an impairment of the obligation of a contract until it is determined what the contract is, and whether it is a valid contract. If it be valid, it still remains to be

determined whether the subsequent proceedings of the city council and legislature impaired its obligation."

In the case of Perry Co. v. Norfolk, 220 U. S. 472, Court said in its opinion, on page 479: "This court, therefore, has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

The same rule is recognized in the late case of Milwaukee Electric Light Co. v. R. R. Comm. of Wisconsin, in an opinion handed down June 14, 1915, the Court using the following language: "It is true that this Court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no state shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract, and the extent of its binding obligation, and parties are not concluded in these respects by the determination and decisions of the Courts of the states. While this is so, it has been frequently held that where a statute of a state is alleged to create or authorize a contract inviolable by subsequent legislation of the state, in determining its meaning such consideration is given to the decisions of the highest court of the state."

"In an action to vacate the charter of a railroad company because a majority interest therein had been purchased by a competing line, which purchase was alleged to be ultra vires, the bill alleged that such holding by the latter company was ultra vires because the Georgia Constitution forbade the Legislature to grant such power to any corporation where its effect might be to lessen or destroy competition. The petition for removal claimed that this impaired the obligation of the contract embodied in the company's charter, which was granted before this provision of the Constitution took effect. *Held*, that this also presented a federal question, although the Supreme Court of Georgia had theretofore decided that the charter did not confer the right claimed.—*State v. Port Royal & A. Ry. Co.*, 56 Fed. 333."

"In a suit in a federal court raising the question whether the state was attempting to impair the obligation of a contract, a decision that this question was res judicata as against the state does not oust the federal jurisdiction, on the theory that it makes the case turn on a question not federal.—*Bank v. Stone*, 88 Fed. 383."

In Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S. 58, we find a situation quite similar to the case at bar. The plea of adjudication by state court was overruled.

"ADMISSIBILITY OF EVIDENCE."

Appellant contends that the testimony of the persons who were alderman and mayor of the city at the time Ordinance No. 180, was enacted as to what they intended should have been received.

The precise question was before the U. S. Court of Appeals, Eighth Circuit, in City of Vermillion v. N. W. Tel. Ex. Co., 189 Fed. 289. The Court said, "But the meaning of municipal ordinances, like other legislative acts, must be ascertained from their language."

We submit that the decree should be affirmed.

Respectfully submitted,

T. H. NULL,

MAX ROYHL,

Counsel for Appellee.

CITY OF MITCHELL v. DAKOTA CENTRAL TELEPHONE COMPANY.**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.**

No. 198. Argued March 15, 18, 1918.—Decided April 15, 1918.

The District Court has jurisdiction over a suit in which a telephone company, occupying streets of a city under ordinances passed pursuant to state law, seeks to enjoin, as an unconstitutional impairment of its contract rights and as involving a destruction of its property in violation of the due process clause of the Fourteenth Amendment, the execution of a later ordinance or resolution by which the city declares the company's rights at an end, assumes power to terminate them, notifies it to remove its lines and exchange and declares a purpose to take steps to secure their removal.

In a suit by a telephone company against a city involving the question whether plaintiff's right to operate its city exchange system was included with its right to operate its long distance system under a later, existing ordinance contract, or was confined to an earlier ordinance contract which had expired, the state supreme court in another case between the parties having treated the ordinances as independent in adjudging the city entitled to share in the gross receipts under a provision of the former not contained in the latter, held, that the judgment, if not actually conclusive upon the District Court, must be accepted as of much weight in determining whether the later ordinance replaced the earlier and gave new contract rights to operate the city exchange.

Grants of rights or privileges by a State or its municipalities are strictly construed; what is not unequivocally granted is withheld; nothing passes by mere implication.

Having granted a nonexclusive right to use streets, etc., for the operation of a local telephone exchange, under which a local system was established, a city passed an ordinance granting the privilege of operating "long distance telephone lines" "within and through" the city, for supplying facilities to communicate "by long distance telephone" or other electrical devices, with parties residing "near or at a distance from" the city; and then another changing the word "lines" to "system," and expressing the proposed communication as with

parties residing "in, near or at a distance from" the city. The grantee under the later ordinances acquired the local system, and was also engaged in supplying the city with long distance telephone service. *Held*, that it would be unjustifiable implication to construe the last ordinance as granting a new term for the local exchange system, and such implication could not be supported by interpreting the term "long distance telephone," apart from its usual meaning, as describing the character of instruments and instrumentalities to be employed rather than their sphere of operation.

Reversed.

THE Dakota Central Telephone Company, herein called the telephone company, brought suit against the City of Mitchell, herein called the city, to enjoin it from enforcing or attempting to enforce a resolution or ordinance of the city passed March 17, 1913, terminating the right of the telephone company to maintain and operate the company's system of telephones and requiring the removal of its poles, etc., from the streets and to declare the resolution or ordinance unconstitutional and void.

The bill alleges the following facts, which are the basis of the contentions of appellant. We state them narratively:

The telephone company is a South Dakota corporation, and under § 554 of the Civil Code of the State has been given the power to operate telegraph and telephone lines within the towns and cities of the State and to use the public grounds, streets, alleys and highways, subject to control of the proper municipal authorities as to which of them the lines shall run over and across, and the places where the poles to support the wires shall be located.

Since its incorporation the company has acquired by purchase and construction certain lines of telephone and certain telephone exchanges and has been engaged as a common carrier in transmitting telephone messages, is so engaged in about 85 cities, and has about 265 tele-

phone stations, other than exchanges, situated in South Dakota, North Dakota, and Minnesota, and has also, outside of the lines situated in cities and towns, about 85 exchanges, about 265 stations and about 5,000 miles of telephone lines.

May 11, 1898, the city granted by ordinance to F. E. Elce and his associates, heirs and assigns, a right to use the streets and alleys of the city for the maintenance of a public telephone system. The right granted was not exclusive.

Elce duly accepted the terms and conditions of the ordinance and installed a local telephone system and conducted and operated it until on or about July 8, 1904.

The Dakota Central Telephone Lines, a South Dakota corporation, was given by ordinance dated March 21, 1904, and numbered 174, authority to use the streets of the city for the purpose of operating long distance telephone lines within and through the city "for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell." In consideration of the ordinance the city was given the right to string wires on the poles of the company for fire alarm purposes.

The ordinance proved insufficient for its purpose and on June 6, 1904, a new ordinance was passed. The latter ordinance amended § 1 of the other so as to enable communication "with parties residing *in*, near or at a distance from Mitchell." The word in italics was the amendment. And the word "lines" in ordinance No. 174 was changed to the word "system" in ordinance No. 180.

At the time the last ordinances (Nos. 174 and 180) were passed the telephone instruments then in general use could not be used successfully for long distance conversations, but there had been developed instruments for such conversations. Such telephones were then known

as "Long distance telephones" and were only supplied to subscribers at telephone exchanges by special arrangement with the individual subscribers, who desired an instrument efficient for both local and long distance conversations. At said time, however, the art had so far advanced that the public in general were demanding the installation of "Long distance telephones" in local telephone exchanges.

Long prior to the adoption of ordinances 174 and 180 the Southern Dakota Telephone Company had constructed in the city of Mitchell and other towns and cities of the State and had secured the consent of Mitchell to the construction in that city of such lines, commonly known as "Toll lines" as distinguished from telephone exchanges. In 1903 the Dakota Central Telephone Lines purchased those toll lines and was operating them at the time of and long prior to the adoption of ordinances 174 and 180.

That company, relying upon the consent of the city as expressed in ordinance 174, purchased from Elce the property then and now known as the Mitchell Telephone Exchange, consisting of the poles and other property as well as certain real property used in connection therewith. After entering into the contract to purchase and upon discovering the insufficiency of ordinance 174, the company applied to the city for ordinance 180, and when it was passed completed the purchase from Elce and took possession of the property and owned and operated the exchange with all other exchanges until October 2, 1904, when it sold all of its rights to complainant, Dakota Central Telephone Company, and the latter company has since continuously operated the exchange and toll lines.

Thereafter there was such improvement in telephone instruments and appliances that it became desirable to reconstruct the telephone exchange in the city, and in order to install a telephone system known as the "Auto-

matic" it became necessary to put in permanent underground ways in which to place the wires and cables and otherwise construct and install expensive instruments, and in order to be secure in making such extensive improvements the company applied for and obtained permission by ordinance "to place, construct and maintain through and under the streets and alleys, and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances." [This is referred to hereafter as the resolution of April 10, 1907.]

Relying on the ordinance [resolution] and the other ordinances, the company began to reconstruct and extend its telephone exchange in the city, and continued such work until the plant was thoroughly prepared for the installation of the "Automatic System." As part of the improvements the company erected a fireproof exchange building, it and the system causing an expenditure of \$110,000. The system is now in operation and has about 1100 subscribers, all of whom are in direct communication and can communicate with persons at all the exchanges and stations of the company's telephone system in South Dakota, North Dakota, and Minnesota.

The company has complied with all of the requirements of the ordinance and has acquired a vested right to maintain and operate the exchange and lines described.

The company owns and operates lines from the city to other cities and other States than South Dakota (these are all mentioned in the bill) and the tolls for such inter-state communication amount to more than \$4,000 a month. It has also contracted with the United States Government whereby it receives and transmits and delivers the messages of the officers of the Weather Bureau to 32 cities and towns situated on its lines in South Da-

kota. It also furnishes telephone service to other officers of the Government in various towns and cities and places, and that this service may not be interfered with it seeks relief.

The city, assuming it had the right to require the removal of the company's lines and exchange from the city and from the streets and alleys therein, and assuming that the rights of the company would expire May 11, 1913, and further assuming the right to terminate the company's rights, did, on March 17, 1913, notify and request it to remove from the city its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the city and that if it failed to do so, the city would take steps to secure the immediate removal of the described instruments.

At the same meeting the city adopted two other resolutions, one called "Telephone Resolution," by which it declared the right of the company terminated from and after May 11, 1913, and in which it directed the officers of the city not to contract with the company for telephone service and on the said date to terminate all relations with the company; the other, called "Fire Alarm Resolution," which also declared the rights of the company terminated May 11, 1913, and then provided for the fire alarm service to take the place of that supplied by the company.

The threatened removal and consequent destruction of the company's telephone system and the deprivation of rights will cause the company damage to the amount of \$110,000.

Besides the above facts the bill alleges that the ordinance or resolution of the city for the removal of the poles and lines of the company has the force and effect of a law of South Dakota within the intent and meaning

of § 10, Art. I, of the Constitution of the United States and, so construed, is a law impairing the obligation of the contracts existing between the company and the city. That the value of the company's exchange and lines consists largely in installing the poles, wires and other apparatus; that if taken down the salvage will be nominal and that therefore the removal thereof will deprive the company of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. That the wrongs done and threatened will also obstruct and interfere with the dispatch and transmission of interstate business in violation of the Constitution and laws of the United States and of the act of Congress regulating interstate commerce.

An injunction was prayed.

The answer of the city in most part tenders only issues of law; in other words, the effect of the ordinances of the city. The following facts, however, are averred, stated narratively: The company, for a long time after the passage of ordinances 174 and 180, made no claim that its local exchange was not maintained and operated under ordinance 135 (ordinance of Elce) or that that ordinance was in any way repealed or superseded or modified by the other ordinances or that the company was operating a local telephone system under those ordinances, but, on the contrary, the company has complied with all of the terms and conditions of ordinance 135.

The company has frequently negotiated with the city for a renewal or extension of its franchise from and after May 11, 1913, but a renewal or extension has not been granted; and both the company and the city have construed ordinance 135 as in full force and effect and it has in no way been repealed, superseded or modified.

The company did not inform the city or any of its officers of its desire to install an automatic telephone

system and made the improvement with full knowledge of the city's attitude, and in the early part of the year 1913 the company attempted to force the automatic system into the city, regardless of the wishes of the municipal authorities, by securing the consent of the individual citizens thereof to the installation of such telephones, and immediately upon learning of such attempt the city council, March 26, 1912, passed separate resolutions defining the city's attitude.

The company is operating two systems in the city, a local and a long distance system, the former under ordinance 135, (that granted to Elce) and the latter under ordinances 174 and 180; that the rights under ordinance 135 expired May 11, 1913, that the resolutions of which the company complains apply only to ordinance 135, that is, to the local telephone exchange, and do not and were not intended to apply to the long distance system, and the city expressly denies any purpose or intention to interfere with or molest the company in the maintenance and operation of the long distance system.

The city pleads a judgment rendered in a suit in which it was complainant against the company, by which the rights that the latter now asserts were adjudicated against it, and prays, by reason of the premises, that the bill of the company be dismissed.

After hearing, upon a stipulation of certain facts and oral testimony, a decree was entered adjudging the ordinance of the city of March 17, 1913, unconstitutional and void in that it impaired the obligations of the contract contained in ordinance 180, in violation of § 10, Art. I, of the Constitution of the United States, and deprived the company of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and enjoined the city from enforcing the ordinance.

This appeal was then allowed.

Argument for Appellant.

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Mr. Lauritz Miller, with whom *Mr. Edward E. Wagner* was on the brief, for appellant.

Their contention on the jurisdictional question was as follows: The resolution sought to be enjoined has not such dignity or force of law as could impair the obligation of an existing contract, or deprive plaintiff of anything without due process of law. *City of Mitchell v. Dakota Central Telephone Co.*, 25 S. Dak. 409-420.

Conceding for the purpose of argument that the resolution has the force of law, still it does no more than declare the city's position upon the question at issue, and impairs no vested right, nor deprives the company of anything it already possessed. *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142; *Dawson v. Columbia Trust Co.*, 197 U. S. 178; *Des Moines v. Des Moines City Ry. Co.*, 214 U. S. 179; *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517-530; *Hamilton Gas Light Co. v. Hamilton*, 146 U. S. 258; *Curtis v. Whitney*, 13 Wall. 68.

The distinction between the provisions of the resolution and the one under consideration in *Iron Mountain R. R. Co. v. Memphis*, 96 Fed. Rep. 113, that is to say, the reason for the application of the rule contended for by the plaintiff in the latter, while it should not be applied to this case, is clearly pointed out by Mr. Justice Holmes in *Des Moines v. Des Moines City Ry. Co., supra*. It was the element of force contemplated by the resolution in the *Memphis Case* which the court thought deprived the company of its property without due process. In this case, as we have seen, the resolution notified the plaintiff company of the expiration of its rights under Ordinance No. 135, and that unless it removed its poles, etc., the city "would take such steps as might be necessary to secure the immediate removal of said poles, etc."

Mr. T. H. Null, with whom *Mr. Max Royhl* was on the brief, for appellee. As to jurisdiction:

Argument for Appellee.

The resolution of March 17, 1913, was equivalent to a law of the State impairing the obligation of appellee's contract rights. See *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 314. It was within the scope of powers delegated by statute to the city. It is immaterial whether the action is labeled "ordinance" or "resolution." But that the impairment may be by resolution is too well established to be open for discussion. *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453; *Iron Mountain R. R. Co. v. Memphis*, 96 Fed. Rep. 113; *Atchison, Topeka & Santa Fe Ry. Co. v. Shawnee*, 183 Fed. Rep. 85.

Appellant attempts to bring this case within the rule in *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142; *Dawson v. Columbia Trust Co.*, 197 U. S. 178; and *Des Moines v. Des Moines City Ry. Co.*, 214 U. S. 179. In the *St. Paul Case*, the court says, "No legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract did or could result." In the *Dawson Case*, the court says, "There was no legislation subsequent to the contract." In the *Des Moines Case*, the court says, "We are of the opinion that this (the city resolution) is not a law impairing the rights alleged by appellee." "That the only menace to appellee was the direction to the city solicitor to bring suit to determine the right of the parties." The present case comes squarely within the rule announced in *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58. There the offending ordinance required the telephone company to remove its poles and wires from the streets within a reasonable time and upon failure to remove the mayor was directed to have them removed. In the case at bar the ordinance or resolution terminates the rights of the company and declares the company shall have no right after May 11, 1913, to operate a telephone exchange and requires the company to forthwith on May 11, 1913, remove its property from the

streets and in case of its failure to so remove the city council will secure the immediate removal of the same. See *Atchison, Topeka & Santa Fe Ry. Co. v. Shawnee, supra*; and *Northern Pacific Ry. Co. v. Duluth, supra*.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

Counsel agree that the issues on this appeal are: (1) The jurisdiction of the District Court. (2) The scope and interpretation of ordinances Nos. 174 and 180. (3) Whether the judgment pleaded by the city is *res judicata*.

The first proposition needs but little comment. The company attacked the ordinance or resolution of the city requiring the company to remove its poles and wires from the streets as an impairment of the contract constituted by other ordinances and hence invoked against the city the contract clause of the Constitution of the United States and also, on account of the asserted destruction of its property, urged in its protection the due process clause. The city combated both propositions. The District Court, however, sustained both, resting its decision upon the opinion of the Supreme Court of the State in a suit by the city against the telephone company. *City of Mitchell v. Dakota Central Telephone Co.*, 25 S. Dak. 409. We shall presently consider this case. For the disposition of the present contention it is enough to say the case was brought by the city to recover a percentage of gross receipts of the company as provided in ordinance 135. In resistance the company contended that the provision was inserted without authority and was illegal and void, and contended besides that its rights in the streets were not derived from the city but from § 554 of the Civil Code of the State and that it was not competent for the city to impose conditions upon the

company. The court rejected the contentions and held that under the constitution of the State the city had the right to grant or withhold its consent to the use of its streets, and it necessarily had the right to grant the same upon such terms and conditions as it might choose to impose.

Applying the case, the District Court sustained the validity of ordinance No. 135, but decided that it expired by limitation of time in May, 1913, and that necessarily the rights granted by it terminated on that date, and that the company's rights, if it had any, were derived from ordinance 180 and the resolution of April 10, 1907.¹ The court considered the former a valid exercise of the power of the city and a contract between it and the company which was impaired by the subsequent resolutions.

It will be seen, therefore, that the company invoked rights under the Constitution of the United States and the District Court considered them to be substantial, not formal, and accordingly exercised jurisdiction.

The second and third propositions mingle in discussion. The District Court decided, as we have said, that ordinance 180 constituted a contract between the city and the company, and, exerting the right to interpret it, further decided that it gave the company the right to occupy the streets and compelled an injunction against the city's resolution and attempt to remove it. We shall spend no time in vindication of the exertion of the right; it is an established right of the federal courts, when the

¹ "Be it resolved, by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys, and public grounds of said city all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

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contract clause of the Constitution of the United States is invoked, and we pass immediately to the consideration of ordinance No. 180. As we have seen, it was preceded by some years by ordinance No. 135, and by some months by ordinance No. 174. It was passed, it is contended, to complete the latter; in what respect we shall presently consider.

The case centers upon the ordinance. The telephone company contends that it gives the company the right to operate not merely long distance lines, but a local telephone exchange within the city. In other words, the contention is that it superseded ordinance No. 135 and became a new source of right, a right both of long distance and local exchange. The city opposes this construction and insists that the ordinance confers only the right to maintain a long distance system; that the right to a local exchange was given by ordinance No. 135 and expired with the expiration of that ordinance, May, 1913. And the city urges that its characterization of ordinance No. 180 was sustained by the Supreme Court of the State in *City of Mitchell v. Dakota Central Telephone Co., supra*.

Counsel are at odds as to the case. It, as we have seen, was brought by the city against the company to recover a certain percentage of the gross receipts of the company, provided to be paid by § 4 of ordinance No. 135. One of the defenses of the company was that that ordinance was in effect repealed and superseded by ordinance No. 180 so far as it related to the payment of the percentage of the gross proceeds of the company. The Supreme Court decided against the defense, reversing the judgment of the trial court. The court, in answer to the contention of the company, held that ordinance No. 180 did not "have the effect of repealing, qualifying, or modifying ordinance No. 135, and the fact that the defendant [the company] paid the 10 per cent. on its gross proceeds for two years subsequently to the adoption of ordinance

No. 180 clearly shows that it did not claim, for a time at least, that ordinance No. 180 in any manner affected the prior ordinance . . . There is clearly no inconsistency between the two ordinances; one being for a local city telephone system, and the other being for a long distance telephone system."

The court also decided that the resolution of the city of April 10, 1907, had not the effect of repealing ordinance No. 135, but had only the purpose of giving to the company permission to place its wires underground instead of stretching them on poles in the streets.

The decision would seem to need no comment. It clearly adjudged that the ordinances had different purposes, and that ordinance No. 135 was not repealed in any particular by No. 180, the former applying to the local system and the latter to the long distance system.

The District Court, however, did not give the decision this broad effect but considered that it concluded only "that the two ordinances did not cover so exactly the same field and scope that it could be fairly said that the city intended by the passage of ordinance No. 180 to repeal ordinance No. 135." It is not very obvious how ordinance No. 135 could exist for one purpose and not for all the purposes for which it was enacted; how it could exist for the exactation of a revenue from the system and not exist for the system; how it could co-exist for nine years with No. 180 and yet have been superseded by the latter. Besides, the Supreme Court distinguished between the two ordinances, declaring that there was no inconsistency between them, "one being for a local city telephone system, and the other being for a long distance telephone system." The decision, indeed, gave emphasis to the distinction. From the operation of one a revenue was exacted, upon the other no condition was imposed.

It is, however, alleged in the bill that the company had

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by certain enumerated acts acquired a vested right to maintain and operate its telephone exchange and lines, and to secure its peaceable enjoyment of such rights as against the wrongful acts of the city it brought this suit. This idea is not pressed in the argument and is not sustained by the stipulated facts. The case is rested upon "the scope and interpretation to be placed upon Ordinances Nos. 174 and 180," the contention being that they constitute a contract the obligation of which the resolution of the city, requiring the removal of the company's poles and wires from the streets, impairs. And such was the decision of the District Court. The basis of the contention and decision is that those ordinances superseded ordinance No. 135, taking the place of the latter, giving all the rights of a local exchange as the latter did and adding to them the rights of a long distance system; and this conclusion is deduced from the words of the ordinances and explanatory circumstances, the necessary connection, it is said, and the utility of the local system to the long distance system.

First, as to the titles of the ordinances and the words of each that are said to be determinative of their meaning. The title of No. 174 is as follows: "An ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires for the purpose of operating long distance telephone lines, within and through the city of Mitchell, South Dakota."

Section 1 provides that "the right and privilege given" shall be for a period of twenty years "for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions therein named."

The title of ordinance No. 180 is exactly the same as

that of No. 174, except that the word "lines" of the latter is changed to the word "system" by the former. Section 1 of No. 180 is the same as section 1 of No. 174, except certain immaterial changes and except the word "in" in the provision expressing the purpose of the granted privilege to be "to communicate by long distance telephone or other electrical devices with parties residing *in*, near or at a distance from Mitchell . . .".

Stress is put upon the words "system," "within," "through," "in," and "near," and it is insisted that they were necessarily intended to accommodate the residents of the city and to give them the facilities of local and long distance telephone service and that something more was intended than to grant a mere right to carry long distance telephone wires through the city.

The contention has its strength and persuaded the District Court, but it is countervailed by other considerations. Undoubtedly the inducement of ordinances Nos. 174 and 180 was to give to the residents of the city long distance telephone facilities, but it cannot be said that granting such right inevitably or even naturally repealed or superseded the right to operate a local system which was given and then existed under ordinance No. 135, and which then had nine years to run. Besides, the decision of the Supreme Court is a factor of controlling strength. It explicitly decided that ordinances 135 and 180 had distinct purpose and operation and that the latter did not repeal or supersede the former. The issue was tendered by the company and the decision upon it is conclusive against the company.

But if the decision be not given that extent, as it was not by the District Court, and if it be considered that the latter court had a right, as a federal court, to determine the existence of a contract and its elements, such right does not preclude a deference to the views of the state court, which, moreover, have the support of principles

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declared by this court, that grants of rights and privileges by the State or of any of its municipalities are strictly construed "and whatever is not unequivocally granted is withheld; nothing passes by mere implication." *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34; *Blair v. Chicago*, 201 U. S. 400, 471.

The contentions of the company in the case at bar rest entirely upon implication, the implication of a repeal of one ordinance by another, which is never favored, though the ordinances expressed different purposes and could, and did co-exist for such purposes; and this implication is made to depend upon another, that is, that the ordinary meaning of the words "long distance telephone" used in ordinance No. 180 is translated to signify and derive meaning from the function of the instrumentalities employed, such as transmitters, receivers, poles, wires, switching devices and battery systems, etc.

We may conclude the discussion with the observation that if ordinance No. 180 had been intended to embrace and continue the right granted by ordinance No. 135 and to grant a further right of a long distance telephone system, there was a simple and direct way of doing it, clear to every understanding, and it would not have been left to be collected from disputable circumstances and the function of instruments known only to experts. At any rate, as it has been so left, the ambiguity resulting must be resolved against the telephone company. It should have taken care that the right it sought was clearly defined.

It will be observed that the city expressly declares that it does not intend to interfere with or molest the telephone company in the maintenance and operation of the long distance system, and that the resolution or ordinance of which the company complains is directed only to the telephone system provided for in ordinance No. 135. After certain recitations and whereases it is

as follows: "Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota."

Whatever is necessary, therefore, for the maintenance and operation of the long distance system provided for in ordinance No. 180 is not intended to be disturbed. We must leave the adjustment, however, to the District Court.

Decree of the District Court reversed and the case remanded for further proceedings in conformity with this opinion.
